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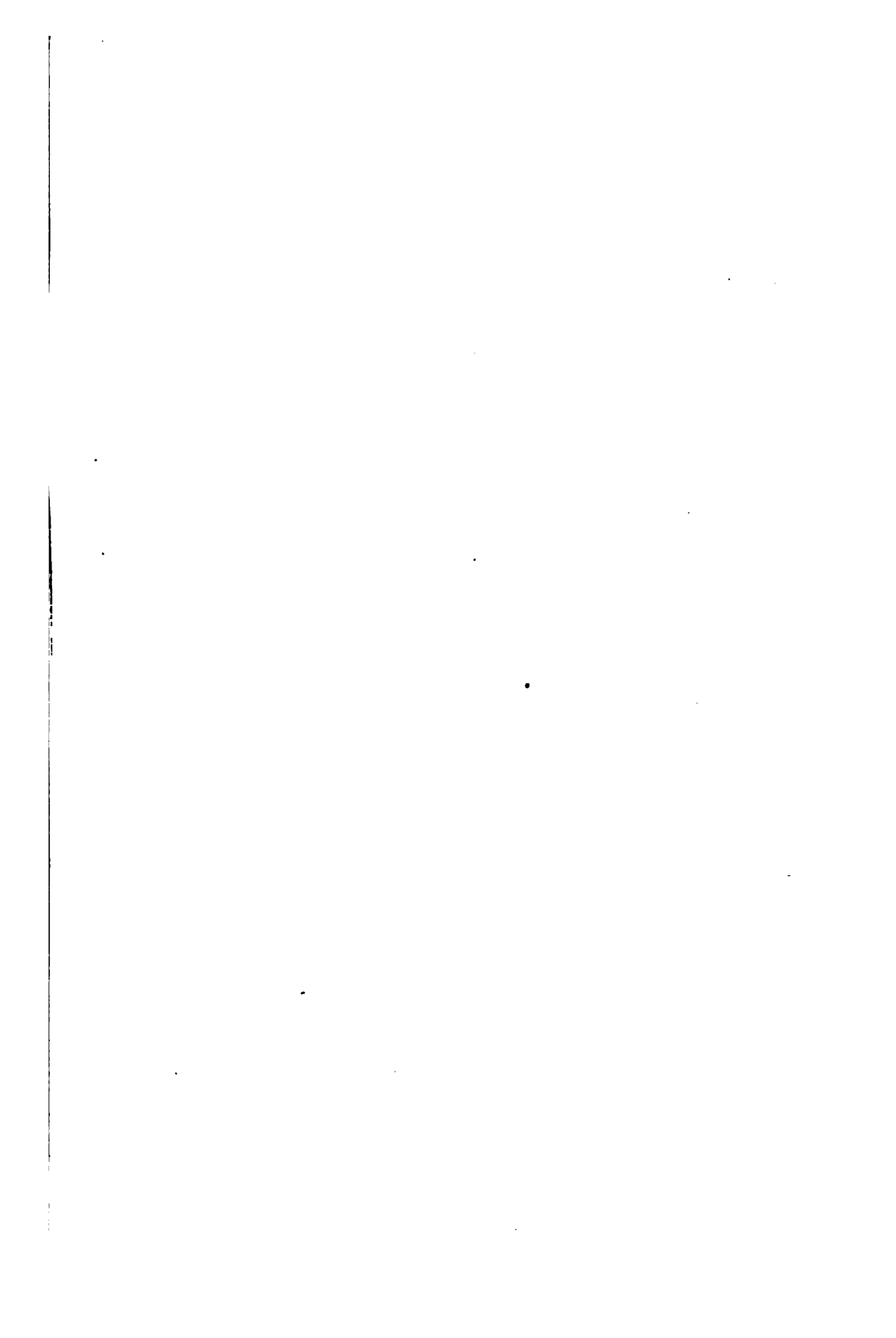
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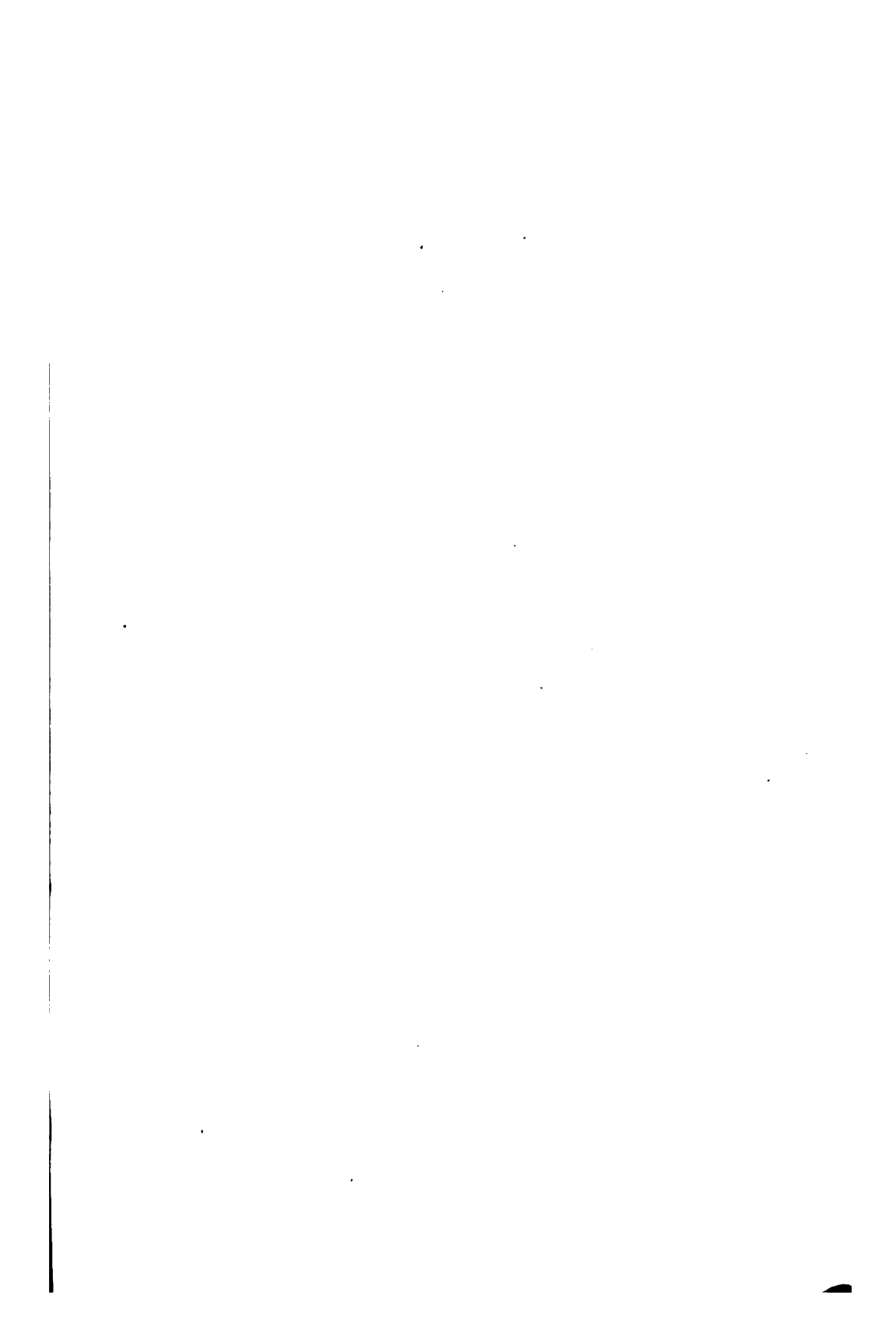


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TABLE
OF
CASES REPORTED

	<i>Page</i>
Abercrombie v. Cullen.....	515
Aetna Accident & Liability Company, Columbia Security Company v.....	116
Allen v. Spokane.....	407
Allis-Chalmers Manufacturing Company v. Ellensburg	533
Alverson v. Hooper.....	510
American Minerals Producing Company, Flanagan v.....	569
Anderson, Larson v.....	157
Andersonian Investment Company v. Wade.....	373
Archibald v. Northern Pacific Railroad Company	97
Bailey v. School District No. 49, King County...	612
Baker, Brown v.....	161
Baker v. Tennent.....	663
Bashor, Hays v.....	491
Bayer's Estate, In re.....	565
Bernstein v. Schwartz.....	271
Bert, Ellis v.....	190
Biglan v. Industrial Insurance Commission.....	8
Bono v. Warner.....	180
Branch, Miller v.....	700
Brandon v. Globe Investment Company.....	360
Bromley v. Heffernan Engine Works.....	31
Brown v. Baker.....	161
Brown, State v.....	205
Bullock v. Yakima Valley Transportation Com- pany	413
Bundy v. Dickinson.....	52

	<i>Page</i>
Campbell, National Surety Company v.....	596
Carey v. Wilsey.....	679
Carnation Lumber & Shingle Company, Swaf- ford v.....	305
Champneys, Konick v.....	35
Chelan County, Quigg Construction Company v..	314
Chellew, White v.....	526, 628
Clark v. Wilson.....	127
Clausen, State ex rel. Govan v.....	133
Clausen, State ex rel. Lister v.....	146
Clausen, State ex rel. Rydstrom v.....	133
Clements, Johnson v.....	332
Coastwise Steamship & Barge Company, Haines v.....	700
Colman Dock Company, Hynes v.....	642
Columbia River Timber & Logging Company v. Commissioners of Diking District No. 2, of Wahkiakum County.....	148
Columbia Security Company v. Aetna Accident & Liability Company.....	116
Commissioners of Diking District No. 2 of Wah- kiakum County, Columbia River Timber & Log- ging Company v.....	148
Connor & Groger, Incorporated v. Forest Mills of British Columbia, Limited.....	468
Cowlitz Chehalis & Cascade Railway, North Coast Power Company v.....	591
Cullen, Abercrombie v.....	515
Davenport, Nelson v.....	259
Day, Freyman v.....	71
Den Bleyker v. King County.....	687
Dickinson, Bundy v.....	52
Donovan, State v.....	276
Downing v. Downing.....	12
DuPont de Nemours Powder Company v. Pederson	335

Ellensburg, Allis-Chalmers Manufacturing Com- pany v.	533
Ellensburg Milling Company, Jones-Scott Com- pany v.	73
Ellis v. Bert.	190
Evans v. Rublee.	174
Fellin's Estate, In re.	626
First National Bank of Everett v. Northwest Motor Company.	167
Flanagan v. American Minerals Producing Com- pany.	569
Forest Mills of British Columbia Limited, Connor & Groger Incorporated v.	468
Freyman v. Day.	71
Galland Brothers v. Rundel.	5
Garring v. Stephens.	474
General Electric Company, Schulze v.	401
Gilluly v. Hawkins.	79
Globe Investment Company, Brandon v.	360
Goldberg, Shemanski v.	654
Goodrich v. Starrett.	437
Gowey v. Seattle Lighting Company.	479
Great Northern Railway Company v. Stevens County.	238
Great Northern Railway Company, Williams v..	344
Griffiths & Sprague Stevedoring Company, Lund v.	220
Hagan, Olsen v.	531
Haines v. Coastwise Steamship & Barge Company	700
Hallett, Williamson v.	176
Hamilton's Estate, In re.	326
Hanauer, Hershey v.	498
Hanson v. Seattle.	586
Harding, State v.	606
Harris v. Saunders.	195

	<i>Page</i>
Harvey, State ex rel. City of Republic v.....	48
Hawkins, Gilluly v.....	79
Hays v. Bashor.....	491
Heffernan Engine Works, Bromley v.....	31
Heitmiller v. Prall.....	382
Hershey v. Hanauer.....	498
Hill v. Seattle.....	572
Hinkhouse, Kelly v.....	93
Holter v. Holter.....	519
Hooper, Alverson v.....	510
Howell, State ex rel. Mullen v.....	340
Hynes v. Colman Dock Company.....	642
 Industrial Insurance Commission, Biglan v.....	 8
Industrial Insurance Commission, Talbot v.....	231
Industrial Insurance Department, Parker v.....	235
In re Bayer's Estate.....	565
In re Fellin's Estate.....	626
In re Hamilton's Estate.....	326
In re Jiskra's Estate.....	187, 190
In re Local Improvement Districts Numbers 29 to 37, Yakima County.....	 211
In re Masterson's Estate.....	307
In re Smith's Estate.....	652
 Jiskra's Estate, In re.....	 187, 190
Johnson v. Clements.....	332
Jones-Scott Company v. Ellensburg Milling Com- pany.....	 73
Judd, Katz v.....	557
Jurey, State ex rel. Luketa v.....	44
 Katz v. Judd.....	 557
Kelley, State v.....	245
Kelly v. Hinkhouse.....	93
Kennery v. Northwestern Junk Company.....	656
Kent v. Walla Walla Valley Railway Company..	251

CASES REPORTED.

ix

	<i>Page</i>
. King County, Den Bleyker v.....	687
Konick v. Champneys.....	35
Kusumi, Pallis v.....	641
Larson v. Anderson.....	157
Lehman v. Maryott & Spencer Logging Company	319
Linville v. Wiedrich.....	1
Lloyd, McManis v.....	307
Local Improvement Districts Numbers 29 to 37	
Yakima County, In re.....	211
Lund v. Griffiths & Sprague Stevedoring Company	220
McManis v. Lloyd.....	307
Marsh Mines Consolidated, Tatum v.....	367
Maryott & Spencer Logging Company, Lehman v.	319
Masterson's Estate, In re.....	307
Miller v. Branch.....	700
Miller v. Scarbrough.....	646
Miller, State ex rel. McMillan v.....	390
Miller v. Supreme Tent of the Knights of the Mac- cabees of the World.....	689
Molberget, Stubbs v.....	89
Morgan v. Veness Lumber Company.....	674
Mueller, Northern Pacific Railway Company v...	684
National Surety Company v. Campbell.....	596
Nelson v. Davenport.....	259
North Coast Power Company v. Cowlitz, Chehalis & Cascade Railway.....	591
North Pacific Fruit Distributors, Umpqua Valley Fruit Union v.....	265
Northern Pacific Railroad Company, Archibald v.	97
Northern Pacific Railway Company v. Mueller...	684
Northwest Motor Company, First National Bank of Everett v.....	167
Northwestern Junk Company, Kennery v.....	656
Olsen v. Hagan.....	531

	<i>Page</i>
Pacific American Fisheries, Petersen v.....	63
Pallis v. Kusumi.....	641
Parker v. Industrial Insurance Department.....	235
Pederson, DuPont de Nemours Powder Com- pany v.....	335
Person, Strang v.....	503
Petersen v. Pacific American Fisheries.....	63
Peterson, Van Buren v.....	697
Pierce, Western Farquhar Machinery Company v.	621
Pierce County, Titlow v.....	633
Postal Telegraph-Cable Company, Rasher-King- man-Herrin Company v.....	543
Powell, State ex rel. Thompson v.....	561
Prall, Heitmiller v.....	382
Presta, State v.....	256
Puget Sound Bridge & Dredging Company, Wif- fenbach v.....	455
Quigg Construction Company v. Chelan County..	314
Rasher-Kingman-Herrin Company v. Postal Tele- graph-Cable Company.....	543
Rex Consolidated Mining Company, Rossi v.....	296
Rossi v. Rex Consolidated Mining Company.....	296
Rublee, Evans v.....	174
Rundel, Galland Brothers v.....	5
Saunders, Harris v.....	195
Savidge, State ex rel. McKee v.....	292
Savidge, State ex rel. Morris v.....	671
Savidge, State ex rel. Shoudy v.....	292
Scarbrough, Miller v.....	646
Scheller v. Tacoma Railway & Power Company..	348
School District No. 49 King County, Bailey v....	612
Schulze v. General Electric Company.....	401
Schwartz, Bernstein v.....	271
Sears, Wintler Abstract & Loan Company v.....	461

CASES REPORTED.

xi

	<i>Page</i>
Seattle, Hanson v.....	586
Seattle, Hill v.....	572
Seattle Lighting Company, Govey v.....	479
Seiffert Company v. Wright.....	616
Shemanski v. Goldberg.....	654
Simpson v. Sisters of Charity of the House of Providence.....	82
Sisters of Charity of the House of Providence, Simpson v.....	82
Smith's Estate, In re.....	652
Spokane, Allen v.....	407
Starrett, Goodrich v.....	437
State v. Brown.....	205
State v. Donovan.....	276
State v. Harding.....	606
State v. Kelley.....	245
State v. Presta.....	256
State v. Swartz.....	21
State v. Whalen.....	287
State ex rel. Calouri v. Stratton.....	485
State ex rel. Christensen v. Superior Court, Pierce County.....	666
State ex rel. Clapp v. Urquhart.....	299
State ex rel. Cline v. Superior Court, Lewis County.....	603
State ex rel. Govan v. Clausen.....	133
State ex rel. Lister v. Clausen.....	146
State ex rel. Luketa v. Jurey.....	44
State ex rel. McKee v. Savidge.....	292
State ex rel. McMillan v. Miller.....	390
State ex rel. McPherson Brothers Company v. Superior Court, Chelan County.....	58
State ex rel. Mead v. Superior Court, Yakima County.....	636
State ex rel. Morris v. Savidge.....	671
State ex rel. Mullen v. Howell.....	340

	<i>Page</i>
State ex rel. Pioneer Mining & Ditch Company v. Superior Court, King County.....	183
State ex rel. Ratliffe v. Superior Court, Whit- man County.....	443
State ex rel. Republic v. Harvey.....	48
State ex rel. Rydstrom v. Clausen.....	133
State ex rel. Shoudy v. Savidge.....	292
State ex rel. Thompson v. Powell.....	561
State ex rel. Wilkerson v. Superior Court, Yak- ima County.....	15
Stephens, Garring v.....	474
Stevens County, Great Northern Railway Com- pany v.....	238
Strang v. Person.....	503
Stratton, State ex rel. Calouri v.....	485
Stubb, Swanson v.....	170
Stubbs v. Molberget.....	89
Superior Court, State ex rel. Christensen v....	666
Superior Court, State ex rel. Cline v.....	603
Superior Court, State ex rel. McPherson Brothers Company v.....	58
Superior Court, State ex rel. Mead v.....	636
Superior Court, State ex rel. Pioneer Mining & Ditch Company v.....	183
Superior Court, State ex rel. Ratliffe v.....	443
Superior Court, State ex rel. Wilkerson v.....	15
Supreme Tent of the Knights of the Maccabees of the World, Miller v.....	689
Swafford v. Carnation Lumber & Shingle Com- pany	305
Swanson v. Stubb.....	170
Swartz, State v.....	21
 Tacoma Railway & Power Company, Scheller v..	 348
Talbot v. Industrial Insurance Commission.....	231
Tatum v. Marsh Mines Consolidated.....	367

CASES REPORTED.

xiii

	<i>Page</i>
Tennent, Baker v.....	663
Titlow v. Pierce County.....	633
Umpqua Valley Fruit Union v. North Pacific Fruit Distributors	265
Urquhart, State ex rel. Clapp v.....	299
Van Buren v. Peterson.....	297
Veness Lumber Company, Morgan v.....	674
Wade, Andersonian Investment Company v.....	373
Walla Walla Valley Railway Company, Kent v..	251
Warner, Bono v.....	180
Western Farquhar Machinery Company v. Pierce	621
Whalen, State v.....	287
White v. Chellew.....	526, 628
Wiedrich, Linville v.....	1
Wiffenbach v. Puget Sound Bridge & Dredging Company	455
Williams v. Great Northern Railway Company..	344
Williamson v. Hallett.....	176
Wilsey, Carey v.....	679
Wilson, Clark v.....	127
Wintler Abstract & Loan Company v. Sears.....	461
Wright, Seiffert Company v.....	616
Yakima Valley Transportation Company, Bul- lock v.....	413

TABLE OF CASES CITED BY THE COURT

			<i>Page</i>
Abb v. Northern Pac. R. Co.....	28	Wash. 428.....	160
Abell v. Modern Woodmen of America	96	Minn. 494.....	695
Abrahamson v. Cummings.....	65	Wash. 35.....	472
Adams Express Co. v. Croninger...	226	U. S. 491.....	551
Alamo Oil Refining Co. v. Richards...	172	S. W. (Tex. Civ. App.) 159	365
Albany Bottling Co. v. Watson....	103	Ga. 503.....	242
Aldredge v. Oregon-Washington R. & Nav. Co.....	79	Wash. 349.....	255
Allen v. Olympia Light & P. Co....	13	Wash. 307.....	572
Allis-Chalmers Co. v. City of Atlan- tic	164	Iowa 8.....	539
Alwood v. Ruckman.....	21	Ill. 200.....	452
American Packing Co. v. Luketa...	98	Wash. 6.....	45
Anderson v. Hill.....	53	Barb. (N. Y.) 238.....	42
Anderson v. Whatcom County.....	15	Wash. 47.....	302
Ankeny v. Clark.....	1	Wash. 549.....	507
Anson v. Northern Pac. R. Co.....	45	Wash. 92.....	595
Armour v. Seixas.....	80	Wash. 181.....	625
Averbuch v. Great Northern R. Co..	55	Wash. 633.....	255
Babcock v. Goodrich.....	47	Cal. 488.....	50
Bagaglio v. Paolino.....	35	R. I. 171.....	87
Bailey v. Western Union Tel. Co....	97	Kan. 619.....	547
Baird v. Northern Pac. R. Co.....	78	Wash. 67.....	100, 101
Baker v. Johnson County.....	37	Iowa 186.....	405
Baker v. Keever.....	130	Ga. 257.....	453
Bales v. State.....	3	W. Va. 685.....	283
Bane v. Dow.....	80	Wash. 631.....	453
Barager v. Arcadia Orchards Co....	91	Wash. 294.....	346
Baring v. Galpin.....	18	Atl. 266.....	538
Barker v. State Fish Commission..	88	Wash. 73.....	139, 140
Barlow v. Tacoma.....	12	Wash. 32.....	410
Barrow v. Barrow.....	34	Wash. 684.....	339
Bartholemew v. Springdale.....	91	Wash. 408.....	398
Batcheller-Durkee v. Batcheller....	39	R. I. 45.....	311
Bayer's Estate, In re.....	101	Wash. 694.....	565

		<i>Page</i>
Bedolla v. Williams.....	15 Cal. App. 738.....	453
Beebe v. Redward.....	35 Wash. 615.....	120
Beers v. Arkansas.....	61 U. S. (20 How.) 527.....	614
Bell v. State.....	36 L. R. A. (N. S.) 98.....	609
Benes v. Supreme Lodge, Knights & Ladies of Honor.....	231 Ill. 134.....	694
Binnian v. Baker.....	6 Wash. 50.....	463
Birlew v. St. Louis & S. F. R. Co....	104 Mo. App. 561.....	433
Blackwell Milling & Elev. Co. v. Western Union Tel. Co.....	17 Okl. 376.....	550
Blanchard v. Detroit, L. & L. M. R. Co.	31 Mich. 43.....	353
Bogart v. Pitchless Lumber Co....	72 Wash. 417.....	33, 261, 262
Booth v. Opel.....	244 Ill. 317.....	242
Bowden v. Walla Walla Valley R. Co.	79 Wash. 184.....	255
Bowers v. Graves & Vinton Co.....	8 S. D. 385.....	452
Boyce v. Western Union Tel. Co....	119 Va. 14.....	547
Bravis v. Chicago, M. & St. P. R. Co.	217 Fed. 234.....	104
Brooks, Matter of.....	104 N. Y. Supp. 670.....	567
Brotherton v. Gilchrist.....	144 Mich. 274.....	449
Brown v. Anacortes.....	79 Wash. 33.....	460
Brown v. Baruch.....	24 Wash. 572.....	379
Brown v. Walker.....	161 U. S. 591.....	290
Brown v. Winehill.....	3 Wash. 524.....	316
Bruenn v. North Yakima School Dist. No. 7.....	101 Wash. 374.....	613
Buffalo Pitts Co. v. Shriner.....	41 Wash. 146.....	624
Burke v. Northern Pac. R. Co.....	80 Wash. 188.....	699
Burleigh v. Consumers Pub. Co....	95 Wash. 49.....	176
Burns v. Bradford-Kennedy Lum- ber Co.	61 Wash. 276.....	620
Calder v. Walla Walla.....	6 Wash. 377.....	590
Cameron v. Calkins.....	43 Mich. 191.....	216
Cameron v. Lyen.....	57 Wash. 384.....	686
Campbell v. Zabriskie.....	8 N. J. Eq. 738.....	665
Carruthers v. Whitney.....	56 Wash. 327.....	380
Carson v. State.....	128 Ala. 58.....	258
Carson v. Three States Lumber Co..	108 Tenn. 681.....	679
Cawsey v. Brickey.....	82 Wash. 653.....	109
Cedarberg v. Guernsey.....	12 S. D. 77.....	452
Central Union Tel. Co. v. Swoveland	14 Ind. App. 341.....	549
Chapman v. Eames.....	67 Me. 452.....	452
Cheney v. Buckmaster.....	29 Neb. 420.....	216
Chicago, M. & St. P. R. Co. v. Solan.	169 U. S. 133.....	553

CASES CITED.

xvii

Page

Chinook Lum. & Shingle Co. v.		
McLane Lum. & Shingle Co.....	107 Wash. 587.....	406
Churchill v. Stephenson.....	14 Wash. 620.....	460
City of Hoboken v. Gear.....	27 N. J. L. 265.....	398
City of Moundsville v. Ohio River		
R. Co.	37 W. Va. 92.....	431
City of South Bend v. Reynolds....	155 Ind. 70.....	50
Clancy v. McElroy.....	30 Wash. 567.....	599
Clark v. Lincoln County.....	1 Wash. 518.....	426, 427
Clerf, In re.....	55 Wash. 465.....	46
Cleveland v. City Council of		
Augusta	102 Ga. 233.....	432
Cohen, Ex parte.....	104 Cal. 524.....	290
Cole v. Spokane Gas & Fuel Co....	66 Wash. 393.....	363
Commonwealth v. Coffee.....	9 Gray (Mass.) 139.....	283
Commonwealth v. Rourke.....	10 Cush. (Mass.) 397.....	281
Commonwealth v. Smith.....	129 Mass. 104.....	283
Connely v. Malloy.....	106 Wash. 464.....	507
Continental Bldg. & Loan Ass'n. v.		
Mills	44 Neb. 136.....	216
Cook County v. Chicago Industrial		
School	125 Ill. 540.....	144
Cooper v. Hindley.....	70 Wash. 331.....	186
Corbett v. Boston & M. R.....	219 Mass. 351.....	101
Corliss v. Walker Co.....	57 Fed. 434.....	464
Coulston v. Dover Lum. Co.....	28 Idaho 390.....	371
County of Lancaster v. Brinthal..	29 Pa. St. 38.....	397
Coyle v. Seattle Electric Co.....	31 Wash. 181.....	331
Cules v. Northern Pac. R. Co.....	105 Wash. 281.....	107
Cuschner v. Pittsburg-Hickson Co..	91 Wash. 371.....	32
Dahl v. Puget Sound Iron & Steel		
Works	77 Wash. 126.....	363
Dane v. Daniel....	28 Wash. 155.....	330
David v. Guich.....	30 Wash. 266.....	688, 689
Davidson v. New Orleans.....	96 U. S. 97.....	110
Davis v. Seattle.....	37 Wash. 223.....	644
Davis-Kaser Co. v. Colonial Fire		
Underwriters Ins. Co.....	91 Wash. 383.....	108
Day v. Cleveland, C., C. & St. L. R.		
Co.	137 Ind. 206.....	364
Day v. Stevens.....	88 N. C. 83.....	452
Day v. Tacoma R. & P. Co.....	80 Wash. 161.....	352
Densmore v. Evergreen Camp No.		
147, W. O. W.....	61 Wash. 230.....	441, 442
Des Arc Oil Mill v. Western Union		
Tel. Co.	132 Ark. 335.....	547, 555

			Page
Dettis v. Western Union Tel. Co....	141 Minn.	361.....	547
Dickerson v. Western Union Tel. Co.	114 Miss.	115.....	547
Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co..	193 Mo.	236.....	661
Dixon v. Niccolls.....	39 Ill.	372.....	452
Dixon v. Parker, Moran & Parker..	102 Wash.	101.....	620
Dixon v. Western Union Tel. Co....	68 Fed.	630.....	364
Dobson v. Dobson.....	7 Neb.	296.....	216
Dorsey v. St. Louis A. & T. H. R. Co.	58 Ill.	65.....	353
Douglas v. Stokes....	149 Ky.	506.....	464
Douglas County v. Grant County...	98 Wash.	355.....	398
Durre v. Western Union Tel. Co....	165 Wis.	190.....	547
Dyer County v. Chesapeake, O. & S. W. R. Co.....	87 Tenn.	712.....	433
Eastern Kentucky Mineral & Tim- ber Co. v. Swann-Day Lumber Co..	148 Ky.	82.....	678
Edmonds Land Co. v. Edmonds....	66 Wash.	201.....	411
Elzell v. Dodson.....	60 Tex.	331.....	643
Ensign v. Faxon.....	224 Mass.	145.....	567
Ephriam v. Kelleher.....	4 Wash.	243.....	649
Everett v. Paschall.....	61 Wash.	47.....	440, 442
Fanjoy v. Seales.....	29 Cal.	244.....	366
Farley v. C. R. I. & P. Co.....	42 Iowa	234.....	433
Farley v. Letterman.....	87 Wash.	641.....	624
Farquharson v. Yeargin.....	24 Wash.	549.....	137, 138
Ferguson v. Arthur.....	128 Mich.	297.....	679
Fidelity & Deposit Co. of Maryland v. Libby	72 Neb.	850.....	601
First National Bank v. Geske & Co.	85 Wash.	477.....	620
First National Bank of Fargo v. Minneapolis & N. Elev. Co.....	11 N. D.	280.....	203
First Thought Gold Mines, Ltd., v. Stevens County	91 Wash.	437.....	635
Flisk v. Jefferson Police Jury.....	116 U. S.	131.....	394, 397
Fletcher v. Lyon.....	93 Ark.	5.....	679
Foley v. Pierce County School Dist. No. 10.....	102 Wash.	50.....	613
Ford v. Oregon Elec. R. Co.....	60 Ore.	278.....	353
Foster v. Industrial Insurance Commission	107 Wash.	400.....	11
Fowler v. Coates.....	201 N. Y.	257.....	354
Freyman v. Day.....	108 Wash.	71.....	484
Galbraith v. Weber.....	58 Wash.	132.....	68, 70
Gardner v. Western Union Tel. Co..	231 Fed.	405.....	547

CASES CITED.

xix

			<i>Page</i>
Gasch v. Rounds.....	93 Wash.	317.....	39
Georgia Southern R. v. Reeves.....	64 Ga.	492.....	353
German-American State Bank v. Sullivan	50 Wash.	42.....	532
Gilmer v. Mobile & M. R. Co.....	79 Ala.	569.....	353
Goetter v. Colville.....	82 Wash.	305.....	213
Goldie-Klenert Distrib. Co. v. Both- well	67 Wash.	264.....	620
Graton & Knight Mfg. Co. v. Redel- sheimer	28 Wash.	370.....	572
Grays Harbor Construction Co. v. Grays Harbor County.....	99 Wash.	184.....	634
Great Northern R. Co. v. State.....	102 Wash.	348.....	247
Green v. Hart.....	27 Ky. Law	970.....	665
Green v. Okanogan County.....	60 Wash.	309.....	317
Griffin v. Ohio & M. R. Co.....	124 Ind.	326.....	362
Guerrieri v. Industrial Insurance Commission	84 Wash.	266.....	483
Gust v. Gust.....	71 Wash.	75.....	17
Haines v. Coastwise Steamship & Barge Co.	104 Wash.	685.....	700
Hall v. Western Union Tel. Co.....	108 S. C.	502.....	547
Hammond v. Jackson.....	89 Wash.	510.....	644
Harkness v. Western Union Tel. Co.	73 Iowa	190.....	550
Haskell Imp. & Seed Co. v. Postal Tel-Cable Co.....	114 Me.	277.....	547
Hawkins v. Front Street Cable R. Co.	3 Wash.	592.....	643
Hawkins v. United States.....	96 U. S.	689.....	317
Helland v. Bridenstein.....	55 Wash.	470.....	27
Helliesen v. Seattle Elec. Co.....	56 Wash.	278.....	595
Herret v. Puget Sound T., L. & P. Co.	103 Wash.	101.....	255
Hewson v. Peterman Mfg. Co.....	76 Wash.	600.....	346
Hilbourne v. Suffolk.....	120 Mass.	393.....	249
Hinckley v. Casey.....	45 Wash.	430.....	173
Holland v. Northern Pac. R. Co.....	55 Wash.	266.....	254
Holloway v. State.....	45 Tex. Cr.	303.....	257
Holt v. Edmondson.....	31 Ga.	357.....	216
Holt v. School Dist. No. 71.....	102 Wash.	442.....	613
Houston Oil Co. v. Boykin.....	153 S.W. (Tex. Civ. App.)	1176	678
Howard v. Chase.....	104 Mass.	249.....	170
Hunt v. Gordon.....	52 Miss.	194.....	665
Hutchings v. Low.....	82 U. S.	77.....	165
Hutchinson Investment Co. v. Van Nostern	99 Wash.	549.....	379

			Page
Ingram v. State.....	67 Ala.	67.....	258
Inmon v. Pearson.....	47 Wash.	402.....	513
Irving v. Irving.....	26 Wash.	122.....	17
Jackson v. Board of Com'rs of Surry County	171 N. C.	379.....	242
Jackson v. White.....	104 Wash.	643.....	507
James Reilly Repair & Supp. Co. v. Smith	177 Fed.	168.....	316
Jeffrey Mfg. Co. v. Blagg.....	235 U. S.	571.....	114
Jennings v. Schwartz.....	82 Wash.	209.....	658, 661
Jennings v. Schwartz.....	86 Wash.	202.....	660, 661
Jennings v. Tacoma R. & Motor Co..	7 Wash.	275.....	362
Johnston v. Nichols.....	83 Wash.	394.....	363
Jones v. Grove.....	76 Wash.	19.....	507
Jones v. Newport News & M. V. Co.	65 Fed.	736.....	358
Jordan v. Welch.....	61 Wash.	569.....	324
Jorguson v. Apex Gold Mines Co....	74 Wash.	243.....	297
Kelly v. Navy Yard Route.....	77 Wash.	148.....	56
Kelly v. Ryan.....	8 Wash.	536.....	185
Keyes v. Sabin.....	101 Wash.	618.....	649
Kidwell v. Houston & G. N. R. Co...	3 Woods	(U. S. Cir. Ct.)	313 227
Kiernan v. City of Portland.....	61 Ore.	398.....	574, 583
Kilday v. Schanckupp.....	91 Conn.	29.....	661
King County v. Ferry.....	5 Wash.	536.....	598
Kirkland v. Ferry.....	45 Wash.	663.....	609
Kirtley v. Spokane County.....	20 Wash.	111.....	427
Kitching v. Brown.....	180 N. Y.	414.....	40
Klug v. Sheriffs.....	129 Wis.	468.....	464
Knickerbocker Co. v. Hawkins.....	102 Wash.	582.....	559
Kocher v. Mayberry.....	15 Tex. Civ. App.	342.....	86
Kohler's Estate, In re.....	15 Wash.	613.....	193
Kopczynski v. Bolcom-Vanderhoof Logging Co.	71 Wash.	93.....	261
Kraft v. City of Madison.....	98 Wis.	252.....	419
Kuehn v. Dix.....	42 Wash.	532.....	322
Kuh v. Lemcke.....	107 Wash.	45.....	405
Larson v. Anderson.....	97 Wash.	484.....	158
Larson v. Hodge.....	100 Wash.	419.....	158
Larson v. McClure.....	95 Wis.	533.....	364
Larson v. McMillan.....	99 Wash.	626.....	56
Laurie v. Ballard.....	25 Wash.	127.....	423
Leaman v. Thompson.....	43 Wash.	579.....	55
Levyreau v. Clements.....	175 Mass.	376.....	464
Lewis v. Seattle.....	5 Wash.	741.....	249
Lewis County v. Montfort.....	72 Wash.	248.....	302

CASES CITED.

xxi

Page

Liston v. Chapman & Dewey Land Co.	77 Ark.	116.....	678
Llewellyn v. Aberdeen Brewing Co.	65 Wash.	319.....	346
Local Improvement Sewer Dist.			
No. 1, In re.....	84 Wash.	565.....	220
Locke v. City of Central.....	4 Colo.	65.....	398
Louisville & N. R. Co. v. Melton....	218 U. S.	36.....	112
Louisville & N. R. Co. v. Strange's			
Adm'x.	156 Ky.	439.....	105
Lucas v. New York, N. H. & H. R.			
Co.	130 Fed.	436.....	358
Lushington v. Seattle Auto & Driv-			
ing Club	60 Wash.	546.....	329, 330
Lynch v. Ninemire Packing Co....	63 Wash.	423.....	363
Lyon v. Grand Rapids.....	121 Wis.	609.....	423
McCormick v. State.....	66 Neb.	337.....	257
McCray v. United States.....	195 U. S.	27.....	142
McCrea v. Bentley.....	154 N. Y. Supp.	174.....	661
McDonnell v. Couer d'Alene Lum-			
ber Co.	56 Wash.	495.....	403
McEvilla v. Puget Sound T., L. &			
P. Co.	95 Wash.	657.....	255
McIntyre v. Detroit Safe Co.....	129 Mich.	385.....	365
McKaig v. Hebb.....	42 Md.	234.....	665
McKenna v. McKenna.....	29 R. I.	224.....	567
McKinney v. Port Townsend &			
P. S. R. Co.....	91 Wash.	387.....	255
McLeod v. Chicago, Milwaukee &			
P. S. R. Co.....	65 Wash.	62.....	226
McRae v. Stillwell.....	111 Ga.	65.....	678
Maltby v. Chicago & W. M. R. Co..	52 Mich.	108.....	432
Manhattan Bldg. Co. v. Seattle....	52 Wash.	226.....	62
Manitowoc County v. Truman.....	91 Wis.	1.....	600
Marble Savings Bank v. Williams..	23 Wash.	766.....	533
Marston v. Rue.....	92 Wash.	129.....	347, 645
Matson v. Johnson.....	48 Wash.	256.....	630
Maxwell v. Harper.....	51 Wash.	351.....	630
Mead v. Ballard.....	74 U. S.	290.....	355
Meadows v. Postal Tel. & Cable Co.	173 N. C.	240.....	547
Meehan v. Shields.....	57 Wash.	617.....	242
Menz Lumber Co. v. McNeeley & Co.	58 Wash.	223.....	78
Merritt v. Earle.....	29 N. Y.	115.....	325
Metler v. Metler.....	32 Wash.	494.....	522
Metropolitan W. S. El. R. Co. v.			
Stickney	150 Ill.	362.....	248
Metzger v. Sigall.....	83 Wash.	80.....	559

		<i>Page</i>
Miles Co. v. Gordon.....	8 Wash. 442.....	450
Miller v. Kemper.....	107 Wash. 274.....	700
Miller v. Moran Bros. Co.....	39 Wash. 631.....	363
Mills v. Seattle & M. R. Co.....	10 Wash. 520.....	353
Miner v. Rembt.....	164 N. Y. Supp. 945.....	131
Moberly v. Kansas City, St. J. & C. B. R. Co.....	17 Mo. App. 518.....	432
Modern Woodmen of America v. Talbot	76 Neb. 621.....	695
Monahan v. National Realty Co.....	4 Ga. App. 680.....	365
Montgomery v. State.....	80 Ind. 338.....	25
Morgan v. Williams.....	77 Wash. 343.....	331
Morley v. Lake Shore & Mich. So. R. Co.	146 U. S. 162.....	397
Mouat v. Seattle, L. S. & E. R. Co....	16 Wash. 84.....	354
Munson v. Baldwin.....	93 Wash. 36.....	529
Murray v. MacDougall & South- wick Co.	88 Wash. 358.....	346
Musser v. Brink.....	68 Mo. 242.....	452
Myhra v. Chicago, M. & P. S. R. Co.	62 Wash. 1.....	371
Nason & Co. v. Stack.....	81 Wash. 147.....	650
Nation v. Planters' & Mechanics' Bank	29 Okla. 819.....	170
National Surety Co. v. Udd.....	65 Wash. 471.....	339
Nelson v. Denny.....	26 Wash. 327.....	698, 699
Nettleton v. Evans.....	67 Wash. 227.....	463
New Brunswick S. & C. T. Co. v. Tiers	24 N. J. L. 697.....	325
New Haven Wire Co. Cases.....	57 Conn. 352.....	538
Newton v. Commissioners.....	100 U. S. 548.....	356
Newton v. Commonwealth.....	31 Ky. Law 327.....	258
Nichols v. Emery.....	109 Cal. 323.....	530
Northcraft v. Blumauer.....	53 Wash. 243.....	379
Northern Bank & Trust Co. v. Graves	79 Wash. 411.....	559
Northern Pac. R. Co. v. Pierce County	77 Wash. 315.....	634
Northern Pac. R. Co. v. Violette....	36 Land Dec. 182.....	685
Norton v. Pacific Power & Light Co.	79 Wash. 625.....	88
O'Brien v. O'Brien.....	19 N. D. 713.....	478
O'Neill & Gyles v. Postal Tel.-Cable Co.	201 Ill. App. 37.....	547
Obenchain v. Daggett.....	68 Ore. 374.....	242
Okazaki v. Sussman.....	79 Wash. 622.....	331
Olsen v. Hagen.....	102 Wash. 321.....	532

CASES CITED.

xxiii

			Page
Olson v. Town of Luck.....	103 Wis.	33.....	423
Omaha Coal, Coke & Lime Co. v.			
Fay	37 Neb.	68.....	216
Omaha & R. V. R. Co. v. Brady.....	39 Neb.	27.....	430
Orrock v. South Moran Township..	97 Wash.	144.....	427
Ostlund's Estate, In re.....	57 Wash.	359.....	330
Ovington v. Aetna Indemnity Co....	36 Wash.	473.....	120
Pacific Aviation Co. v. Philbrick...	67 Wash.	414.....	624
Pacific Power & Light Co. v. White.	96 Wash.	18.....	126
Paducah R. R. Co. v. Common-			
wealth	10 Am. & Eng. R. R.	318... 432	
Paine v. Port of Seattle.....	70 Wash.	294... 575, 578, 581, 582	
Palatka & I. R. R. Co. v. State.....	23 Fla.	546.....	431
Palmer v. New York & L. C.			
Transp. Co.	27 N. Y. Supp.	561.....	422
Parker v. Fergus.....	43 Ill.	437.....	451
Parker v. Industrial Insurance			
Department	102 Wash.	54.....	235
Paul v. Vancouver.....	89 Wash.	331.....	87
Peasley v. Noble.....	17 Idaho	686.....	538
Peet v. Mills.....	76 Wash.	437.....	109
Pendroy v. Great Northern R. Co....	17 N. D.	433.....	256
Pennsylvania R. Co. v. Hughes.....	191 U. S.	477.....	553
People v. Moran.....	144 Cal.	48.....	258
People ex rel. Bloomington v. Chi-			
cago & A. R. Co.....	67 Ill.	118.....	432
Percival v. Cowychee & Wide Hol-			
low Irr. Dist.....	15 Wash.	480.....	108
Phillips v. McConica.....	59 Ohio St.	1.....	312
Pierce v. Michel.....	60 Mo. App.	187.....	422
Pike Street, Matter of.....	42 Wash.	551.....	62
Pioneer Sand & Gravel Co. v. Seat-			
tle Constr. & Dry Dock Co.....	102 Wash.	608.....	352, 353
Poor Grain Co. v. Western Union			
Tel. Co.	196 Mo. App.	557.....	547
Postal Tel-Cable Co. v. Warren-			
Godwin Lumber Co.....	247 U. S.	510.....	556
Press Publishing Co. v. Monroe....	73 Fed.	196.....	464
Pressentin v. Hawkeye Timber Co..	77 Wash.	388.....	620
Pritchard v. Norton.....	106 U. S.	124.....	613
Puget Sound Bridge & D. Co. v. In-			
dustrial Insurance Commission..	105 Wash.	272.....	225
Quackenbush v. Sawyer.....	54 Cal.	439.....	452
Randall v. Gerrick.....	93 Wash.	522.....	160
Randall v. Northwestern Tel. Co....	54 Wis.	140.....	425

	<i>Page</i>
Rea v. Tacoma Mausoleum Ass'n...103	Wash. 429..... 442
Reed v. Johnson..... 27	Wash. 42..... 348
Reed v. Parker..... 33	Wash. 107..... 496
Reed v. Western Union Tel. Co....135	Mo. 661..... 550
Reeves v. Hannan..... 65	N. J. L. 249..... 452
Reid v. Dickinson.....169	N. W. (Iowa) 673..... 106
Reiff v. Coulter..... 47	Wash. 678..... 88
Remsnider v. Union Sav. & Trust Co. 89	Wash. 87..... 483
Replogle v. Seattle School Dist. No. 1 84	Wash. 581..... 483
Rhodes v. Tacoma..... 97	Wash. 341..... 398
Richardton Roller Mills v. Miller... 99	Wash. 654..... 406
Richter v. Buchanan..... 48	Wash. 32..... 463
Roberts v. Washington National Bank 11	Wash. 550..... 339
Rogers v. Miller..... 13	Wash. 82..... 88
Rogers v. Reynolds..... 95	Wash. 470..... 381
Rogers v. Sims..... 39	Mo. App. 678..... 665
Rohrer v. Snyder..... 29	Wash. 199..... 339
Ross v. Howard..... 31	Wash. 393..... 339
Rosseau v. Rouss.....180	N. Y. 116..... 312
Ruge v. Ruge..... 97	Wash. 51..... 522, 523, 525
Rumsey v. People..... 19	N. Y. 41..... 138
Russell County v. Hill.....164	Ky. 360..... 242
Ryan v. United States.....136	U. S. 68..... 76
St. Louis Consolidated Coal Co. v.	
Illinois185	U. S. 203..... 114
Samuel v. Kittenger..... 6	Wash. 261..... 339
Sandberg v. Cavanaugh Timber Co.. 95	Wash. 556..... 322
Schanen-Blair Co. etc. Works v. Sisters of Charity etc..... 77	Wash. 256..... 124
Schneider v. Biberger..... 76	Wash. 504..... 644
Scribner v. State..... 9	Okl. Cr. 465..... 291
Seattle & M. R. Co. v. Murphine.... 4	Wash. 448..... 62
Seward v. Spurgeon..... 9	Wash. 74..... 460
Seymour v. Tacoma..... 6	Wash. 138..... 108
Shaughnessy v. Northland Steam- ship Co. 94	Wash. 325..... 224
Sheard v. United States Fidelity & Guaranty Co. 58	Wash. 29..... 120
Shearer v. Buckley..... 31	Wash. 370..... 423
Shedden v. Sylvester..... 88	Wash. 348..... 670
Sheldon v. Purdy..... 17	Wash. 135..... 50
Sheridan v. Doherty.....106	Wash. 561..... 178
Sherman v. Town of Jefferson.....274	Ill. 294..... 354

CASES CITED.

xxv

			Page
Short v. Cohen.....	11 Ga.	39.....	216
Showalter v. Spangle.....	93 Wash.	326.....	631
Shrum v. Simpson.....	155 Ind.	160.....	449, 451
Sillman v. Spokane Savings & Loan Society	103 Wash.	619.....	406
Silsby v. Aldridge.....	1 Wash.	117.....	463
Skagit State Bank v. Moody.....	86 Wash.	286.....	559
Smith v. Beard.....	21 Wash.	204.....	688, 689
Smith v. Doty.....	91 Wash.	315.....	339
Smith v. Mayor etc. of New York..	37 N. Y.	518.....	397
Spear v. Bremerton.....	90 Wash.	507...578, 579, 581, 584	
Spencer's Case	5 Coke	16.....	352
Spokane v. Merriam.....	80 Wash.	222.....	410
Spokane & Inland Empire R. Co. v. Spokane County	82 Wash.	24.....	635
Spokane Traction Co. v. Granath...	42 Wash.	506.....	248, 249
Stanton v. Dennis.....	64 Wash.	85.....	404
Stanwood v. Clancey.....	106 Me.	72.....	39
Stark Bros. v. Royce.....	44 Wash.	287.....	329, 330
State v. Asotin County.....	79 Wash.	634.....	109
— v. Baldwin	79 Iowa	714.....	25
— v. Beckner	194 Mo.	218.....	258
— v. Bokien	14 Wash.	403.....	610
— v. Boyce	25 Wash.	422.....	533
— v. Boyd	178 Mo.	2.....	257
— v. Brown	181 Mo.	192.....	258
— v. Brummett	98 Wash.	182.....	539
— v. Business Property Sec. Co.	87 Wash.	627.....	483
— v. Center	35 Vt.	277.....	25
— v. Donovan	108 Wash.	276.....	289
— v. Eddon	8 Wash.	292.....	26
— v. Holedger	15 Wash.	443.....	610
— v. Koerner	103 Wash.	516.....	609
— v. Le Pitre	54 Wash.	166.....	610
— v. Lewis	31 Wash.	515.....	610
— v. Lewis	35 Wash.	261.....	289
— v. Lowery	104 Wash.	520.....	208
— v. McCaskey	97 Wash.	401.....	610
— v. McCormick	56 Wash.	469.....	609
— v. May	20 Iowa	305.....	283
— v. Moody	18 Wash.	165.....	28
— v. Moretti	66 Wash.	537.....	58
— v. Murphy	128 Wis.	201.....	290
— v. Polk	66 Wash.	411.....	609
— v. Quinlan	86 N. J. L.	120.....	209
— v. Sexton	37 Wash.	110.....	610
— v. Shelton	16 Wash.	590.....	607

			Page
State v. Sommersville	67	Wash. 638.....	137
— v. Stuth	11	Wash. 423.....	208
— v. Sureties of Krohne.....	4	Wyo. 347.....	291
— v. Thornhill	174	Mo. 364.....	257
— v. Underwood	35	Wash. 558.....	58
— v. Van Waters	36	Wash. 358.....	610
State ex rel. Ami Co. v. Sup'r Court	42	Wash. 675.....	62
— Attorney General v. County			
— of Dorsey	28	Ark. 379.....	138
— Brooking v. Branyan.....	30	Ind. App. 502.....	567
— Brown v. McQuade.....	36	Wash. 579.....	302
— Clark v. Superior Court...	90	Wash. 80.....	18, 19
— Clausen v. Burr.....	65	Wash. 524.....	243
— Consolidated Stone Co. v.			
— Houser	125	Wis. 256.....	144
— Davenport v. Polindexter...	45	Wash. 37.....	17
— Davis-Smith Co. v. Clausen	65	Wash. 156.....	114
— First Nat. Bank of Klam-			
— ath Falls v. Siemens....	68	Ore. 1.....	599
— Govan v. Clausen.....	108	Wash. 133.....	146
— Grant Smith & Co. v. Seat-			
— tle	74	Wash. 438.....	582, 583
— Grass v. White.....	40	Wash. 560.....	289
— Great Northern R. Co. v.			
— Superior Court	68	Wash. 572.....	108
— Hall v. Savidge.....	93	Wash. 676.....	672
— Howell v. Superior Court..	82	Wash. 356.....	670
— Kiehl v. Howell.....	77	Wash. 651.....	343
— Lefebvre v. Clifford.....	65	Wash. 313.....	638
— Lundin v. Superior Court..	90	Wash. 299.....	331
— Maltbie v. Will.....	54	Wash. 453.....	303
— Minneapolis v. St. Paul,			
— M. & M. R. Co.....	98	Minn. 380.....	432
— News Pub. Co. v. Hilligan.	3	Wash. 144.....	152
— Pindall v. Ross.....	55	Wash. 242.....	672
— Race v. Cranney.....	30	Wash. 594.....	302, 568
— Reed v. County of Marion.	21	Kan. 308.....	50
— Rydstrom v. Clausen.....	108	Wash. 133.....	146
— Schwabacher Bros. & Co.			
— v. Superior Court.....	61	Wash. 681.....	670
— Seattle Electric Co. v. Su-			
— perior Court	28	Wash. 317.....	108
— Taro v. Everett.....	101	Wash. 561.....	302
— Woods v. Mackintosh.....	99	Wash. 553.....	46
Steele v. Northern Pac. R. Co.....	21	Wash. 287.....	255
Stephens v. Mutual Lumber Co....	103	Wash. 1.....	323, 324
Stevenson v. Colgan.....	91	Cal. 649.....	137, 140, 142

CASES CITED.

xxvii

			Page
Stewart v. State.....	4	Okl. Cr. 564.....	209
Stiles v. James.....	2	Wash. Terr. 194.....	625
Stiles v. Western Union Tel. Co....	2	Ariz. 308.....	549
Stock v. Tacoma.....	53	Wash. 226.....	590
Strong v. Western Union Tel. Co....	18	Idaho 389.....	549
Stueding v. Seattle Elec. Co.....	71	Wash. 476.....	595
Taake v. Seattle.....	18	Wash. 178.....	533
Tacoma v. Brown.....	69	Wash. 538.....	410
Tacoma v. Titlow.....	53	Wash. 217.....	410
Tacoma v. Weatherby.....	57	Wash. 295.....	62
Tacoma Eastern R. Co. v. Smithgall	58	Wash. 445.....	62
Tague v. State.....	174	Pac. (Okl.) 1106.....	291
Teater v. King.....	35	Wash. 138.....	379
Texas & Pac. R. Co. v. Marshall....	136	U. S. 393.....	356
Texas & Pac. R. Co. v. Scott.....	77	Fed. 726.....	358
Tham v. Steeb Shipping Co.....	39	Wash. 271.....	363
Thayer v. Snohomish Logging Co..	101	Wash. 458.....	108
Thomas v. Seattle Brewing & Malt- ing Co.	48	Wash. 560.....	497
Thompson v. Metropolitan Build- ing Co.	95	Wash. 546.....	125
Tootle v. First National Bank.....	6	Wash. 181.....	572
Tsutakawa v. Kumamoto.....	53	Wash. 231.....	371
Tufts v. Riffe.....	97	Wash. 500.....	488
Uhler v. Olympia.....	87	Wash. 1....575, 578-581, 584	
Underwood v. Stack.....	15	Wash. 497.....	76
Union Stockyards Co. v. Nashville Packing Co.	140	Fed. 701.....	353, 359
United States v. Braddock.....	50	Fed. 669.....	165
University State Bank v. Steeves..	85	Wash. 55.....	87
Unrepeated Message Case.....	44	I. C. C. 670.....	547
Van Brocklin v. Wood.....	38	Wash. 384.....	311
Van Winkle v. Mitchum.....	66	Wash. 296.....	650
Warburton v. Davis.....	123	Md. 225.....	665
Warner v. Abbey.....	112	Mass. 355.....	452
Warren v. Hershberg.....	52	Wash. 38.....	331
Watkins v. Balch.....	41	Wash. 310.....	379
Weidman v. Tacoma R. & Motor Co.	7	Wash. 517.....	425
Wendt v. Industrial Insurance Commission	80	Wash. 111.....	483
Western Union Tel. Co. v. Annis- ton Cordage Co.	6	Ala. App. 351.....	549
Western Union Tel. Co. v. Bailey..	108	Tex. 427.....	547
Western Union Tel. Co. v. Bank of Spencer	53	Okl. 398.....	547

	<i>Page</i>
Western Union Tel. Co. v. Boegli...115 N. E. (Ind.) 773.....	547
Western Union Tel. Co. v. Crall... 38 Kan. 679.....	550
Western Union Tel. Co. v. Foster...224 Mass. 365.....	548
Western Union Tel. Co. v. Hawkins.198 Ala. 682.....	547
Western Union Tel. Co. v. Lowrey. 32 Neb. 732.....	550
Western Union Tel. Co. v. Petteway 21 Ga. App. 725.....	547
Western Union Tel. Co. v. Piper....191 S. W. (Tex. Civ. App.) 817	554
Western Union Tel. Co. v. Schade..137 Tenn. 214.....	547
Western Union Tel. Co. v. Short... 53 Ark. 434.....	549
Western Union Tel. Co. v. Tyler... 74 Ill. 168.....	549
Wetmore v. Crouch.....150 Mo. 671.....	452
Wetmore's Guardianship, In re.... 6 Wash. 271.....	567
Whalen v. Baltimore & O. R. Co....108 Md. 11.....	353, 357
Whalen v. Baltimore & O. R. Co....112 Md. 187.....	357
Wheeler, Osgood & Co. v. Everett Land Co..... 14 Wash. 630.....	572
White v. Beverly Bldg. Ass'n.....221 Mass. 15.....	365
Williams v. Kidd.....170 Cal. 631.....	479
Williams v. Western Union Tel. Co..203 Fed. 140.....	547
Wilsey v. Cornwall..... 40 Wash. 250.....	490
Wilson v. Northern Pac. R. Co.... 31 Wash. 67.....	363
Wingate v. Tacoma..... 13 Wash. 603.....	411
Winton Motor Carriage Co. v. Blomberg 84 Wash. 451.....	624
Winton Motor Carriage Co. v. Broadway Automobile Co..... 65 Wash. 650.....	540
Wissinger v. Reed..... 69 Wash. 684.....	514
Withers v. Wabash R. Co.....122 Mo. App. 282.....	353
Yesler v. Seattle..... 1 Wash. 308...576, 578, 582, 585	
Yosemite Valley Case..... 15 Wall (U. S.) 77.....	165
Young v. Camp Mfg. Co.....110 Va. 678.....	678
Zech v. Bell..... 94 Wash. 344.....	453
Zimmer v. Third Avenue R. Co.... 55 N. Y. Supp. 308.....	422
Zimmerman v. Brooks.....118 Ky. 85.....	143
Zimmerman v. Hafer..... 81 Md. 347.....	530, 632

STATUTES CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.		REMINGTON'S CODE—Continued.	
	<i>Page</i>		<i>Page</i>
Art. 1 §§ 3, 16.....	136	Section 434.....	45
“ 1 § 12.....	139	“ 476.....	460
“ 1 § 16.....	410	“ 478.....	159
“ 2 § 19.....	107	“ 493.....	460
“ 2 § 25.....	136	“ 680, 681.....	184
“ 6 § 1.....	341, 343	“ 693.....	185
“ 6 § 7.....	342	“ 695.....	185
“ 7 § 9.....	243	“ 827.....	173
“ 8 §§ 5, 7.....	136	“ 943.....	440
“ 11 § 1.....	242	“ 947.....	511
“ 11 § 3.....	138	“ 951.....	426
“ 11 § 12.....	243	“ 1111.....	465
BALLINGER'S CODE.		“ 1139.....	87
Section 7312.....	608	“ 1159, 1160.....	541, 542
REMINGTON AND BALLINGER'S CODE.		“ 1182, 1183.....	667
Section 8020.....	582	“ 1341.....	311
REMINGTON'S CODE.		“ 1652.....	194
Section 155.....	392	“ 1699.....	309
“ 159.....	392	“ 1716.....	566
“ 165.....	393	“ 1722.....	185
“ 189.....	646	“ 1730-8.....	172
“ 204.....	668	“ 1987-1.....	639
“ 208, 209.....	670	“ 2337.....	207
“ 209-1, 209-2.....	637	“ 2499.....	207
“ 216.....	670	“ 2547.....	207
“ 259.....	37	“ 2563.....	207
“ 278.....	507	“ 2601.....	285
“ 284.....	95	“ 2605.....	285
“ 286.....	38	“ 3420.....	559
“ 296.....	41	“ 3669.....	465
“ 299, 301.....	228	“ 3670.....	539, 657
“ 358.....	434	“ 3683.....	346
“ 364.....	434	“ 3890.....	426
“ 389, 393.....	172	“ 3908.....	300
“ 391.....	14	“ 3909.....	302, 418
		“ 4037.....	391, 399, 400
		“ 4075.....	399

REMINGTON'S CODE—*Continued.*

	<i>Page</i>
Section 4091—4136-5.....	150
“ 4097.....	150
“ 4102, 4103, 4104.....	151
“ 4103.....	153
“ 4122.....	152
“ 4434.....	487
“ 4697.....	207
“ 4707.....	487
“ 4711.....	488
“ 4771-2.....	342
“ 4971-10.....	341
“ 4971-12.....	341
“ 5029.....	563
“ 5072.....	598
“ 5073.....	597
“ 5140-3.....	50
“ 5561-4.....	206
“ 5562-5, 5562-6.....	611
“ 5575.....	426
“ 5623-4.....	61
“ 5879-1—5879-10.....	315
“ 5879-9.....	315
“ 5917.....	642
“ 6262-13.....	290
“ 6604-1, 6604-2, 6604-8..	72
“ 6604-2.....	481
“ 6604-3.....	482
“ 6604-4.....	482
“ 6604-5.....	10, 232
“ 6604-5 (d).....	236
“ 6604-8.....	484
“ 6611.....	295
“ 6612.....	295
“ 6616.....	295
“ 6681.....	294
“ 6688.....	294
“ 6782-6785.....	672
“ 6785-6787.....	673
“ 6831-1.....	672
“ 7892-22.....	212, 213
“ 7892-23.....	220
“ 7998.....	541
“ 8005-8008.....	576, 577
“ 8309.....	440

REMINGTON'S CODE—*Continued.*

	<i>Page</i>
Section 8730.....	428
“ 8805.....	179
“ 9080.....	429
“ 9212.....	240
“ 9213.....	239, 243

SESSION LAWS.

1889-90, pp. 520, 522,	
§§ 3, 6	575, 576
1897, p. 326.....	576
1907, p. 169.....	428
“ p. 192	428
1909, p. 580.....	576
1911, p. 356, § 5, subd. b, f, g. 10, 11	
“ p. 506, § 1.....	672
1913, p. 424, § 12.....	341
“ p. 520	639
1915, p. 9, § 13.....	290
“ p. 40, § 11.....	342
“ p. 65	205, 206
“ p. 67	139
“ pp. 388, 389	611
“ p. 669, § 3.....	49
1917, p. 60, § 17h.....	607
“ p. 76	232
“ p. 78	233
“ p. 96, § 19. 99, 107, 109, 111, 116	
“ p. 332	612
“ p. 474	482
“ p. 477	482
“ p. 487	484
“ p. 487, § 5.....	72
“ p. 599	672
“ p. 657, § 64.....	327
“ p. 670, § 103.....	326, 331
“ p. 693, § 179.....	653
“ p. 694, § 180.....	653
1919, p. 33, §§ 1, 2, 4, 5... 561-563	
“ p. 299	147
“ p. 687	146

ORDINANCES.

Seattle, No. 39,492.....	573
Seattle, No. 39,667.....	573

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 15237. Department One. July 29, 1919.]

J. W. LINVILLE *et al.*, Appellants, v. SIMON WIEDRICH
et al., Respondents.¹

VENDOR AND PURCHASER (44, 166)—AGREEMENTS FOR RESCISSION—RECOVERY OF PURCHASE MONEY—JUDGMENT—FINDINGS—SUFFICIENCY. Where purchasers were in arrears and could not pay and settled with the vendor by surrendering their rights and the premises and cancelled and destroyed the contract of purchase, they cannot recover sums they had paid on the purchase price.

SAME (172)—PLEADING (157)—STRIKING OUT IRRELEVANT MATTER. In an action to recover moneys paid on a land contract, pursuant to an alleged mutual cancellation when the purchasers were in arrears and unable to pay, allegations of fraud by the vendors inducing the sale are properly struck out as immaterial.

PLEADING (163)—ELECTION—INCONSISTENT DEFENSES. In an action to recover money paid on a land contract, pursuant to an alleged mutual cancellation, defenses of a surrender in consideration of a release, and that the sums paid and improvements made by the purchasers were not equal to the rental value and damages committed, are not inconsistent in the sense of requiring an election.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered July 2, 1918, upon findings in favor of the defendants, dismissing an action on contract; tried to the court. Affirmed.

Benjamin F. Tweedy, Elmer E. Halsey, and Benson Wright, for appellants.

J. N. Pickrell, for respondents.

¹Reported in 182 Pac. 578.

TOLMAN, J.—Appellants, as plaintiffs below, brought this action, alleging that, on November 16, 1914, they entered into a contract with respondents, defendants below, by the terms of which they agreed to purchase, and respondents agreed to sell, certain real estate described in the complaint, consisting of 720 acres of land in Whitman county, the purchase price of which was \$25,000, payable \$3,000 cash, and the balance payable \$2,200 annually, with interest at the rate of five per cent per annum on the whole sum unpaid; that a warranty deed was executed by respondents and by mutual agreement placed in escrow, with instructions to the escrow holder to deliver it to appellants when the purchase price was fully paid, and the appellants were let into immediate possession; that appellants made the cash payment of \$3,000, paid \$1,100 covering the first year's interest about December 1, 1915, and in the fall of 1916, paid \$316 on account of interest; other small payments, mostly in the discharge of taxes upon the property, are alleged to have been made; and permanent improvements of the reasonable value of \$2,000 are claimed to have been placed upon the premises by appellants. It is further alleged that, in January, 1917, there was a mutual agreement to abandon and rescind the contract of sale; that appellants should surrender possession of the property to respondents and relinquish all rights under the contract, "and the accounting, upon rescission, by the said contract of rescission, are left open to be settled by law." Paragraph seven of the complaint alleges that certain false and fraudulent representations were made by respondents which, being relied upon, induced appellants to enter into the original contract of purchase; and then follows an allegation that the amount due to appellants on rescission is \$7,707, for which amount judgment is demanded.

July 1919]

Opinion Per **TOLMAN, J.**

On motion, paragraph seven of the complaint was stricken as being immaterial.

Two affirmative defenses were pleaded in the answer: First, that the contract of purchase contained the usual provisions as to forfeiture if the purchaser should make default, and that, on January 20, 1917, appellants were in arrears two annual payments on account of principal and interest, the whole amounting to \$6,700, and being so in arrears, gave notice that they were unable to pay, that they intended to abandon the land, and requested that they be released from their obligation to pay, and that the moneys paid and improvements made be accepted by respondents as rental for the time they had been in possession, to which respondents agreed, and together they went to the escrow holder, withdrew the papers and destroyed the contract and deed, and that, subsequently, appellants surrendered the premises in accordance with such agreement. And second, that the alleged improvements were a damage to the premises in the sum of \$750; that, through neglect to keep in repair fences, water ditches and mains, and failure to properly prune and irrigate the orchard thereon, the property was still further damaged in the sum of \$2,500, and that the rental value, while appellants were in possession, was \$6,000, which sums greatly exceed the amount paid by appellants under the contract; and the prayer of the answer was for a judgment of dismissal. After a trial to the court without a jury, findings of fact in harmony with respondents' first affirmative defense were made, judgment of dismissal was entered, and this appeal followed.

Appellants have brought no statement of facts to this court, and errors are assigned which raise only questions of pleading, and whether or not the findings of fact, supplemented by admissions in the answer,

support the judgment. The court having found that appellants were in arrears in their payments in the sum of \$6,700, that they could not pay, and that they agreed with respondents to settle all matters between them by surrendering their rights under the contract, cancelling and destroying it and surrendering the premises, it follows that no judgment for the sum which they had admittedly paid could be rendered in their favor, and the judgment which was rendered is the only one which could follow such a finding.

Equally without merit is the claim of error based on the striking of the allegations of fraud from the complaint. Appellants sought only to recover the amounts paid; and no matter what induced them to enter into the contract in the first instance, the question to be determined was only under what agreement, if any, the contract was cancelled or rescinded. In any event, the court having made a conclusive finding as to the terms of the agreement upon which the contract of purchase was cancelled, no proof of fraud in procuring the original contract of purchase could now alter the results. We think the affirmative answers each states a defense, and that they were not inconsistent with each other in the sense that would require an election as to which would be relied upon at the trial.

Finding no error in the record before us, the judgment appealed from is affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

July 1919]

Opinion Per MACKINTOSH, J.

[No. 15348. Department One. July 29, 1919.]

GALLAND BROTHERS, *Appellant*, v. OSMER C. RUNDEL,
Intervener and Respondent, COOK REALTY
COMPANY *et al.*, *Defendants*.¹

CORPORATIONS (66)—STOCK—TRANSFER—RIGHTS OF CREDITORS. An assignment of stock was shown to be as collateral security for a loan and not a sale, and the stock therefore available to creditors of the assignor, where it was made under financial stress to a friend in consideration of advances, and was antedated for the purpose of frustrating creditors, and was not presented to the corporation and the assignor was permitted to vote it as the owner.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 27, 1919, upon findings in favor of the intervener, in garnishment proceedings, tried to the court. Reversed.

Samuel R. Stern, for appellant.

D. W. Henley, for respondent.

MACKINTOSH, J.—The plaintiff, having a judgment against the defendant Cook, sued out a writ of garnishment against the Colville Valley Coal Company for the purpose of having applied to the satisfaction of its judgment stock in that company which the plaintiff claimed was owned by the defendant Cook. Upon the answer of the garnishee being made and a reply thereto filed, one Rundel appeared in the action by way of a complaint in intervention, setting out the fact that he was the owner of the capital stock of the garnishee defendant of which plaintiff had asserted ownership to be in the defendant Cook. From a judgment in favor of the intervener, the plaintiff has appealed. A plain and concise statement of the facts as we find them established by the record in this case makes it unneces-

¹Reported in 182 Pac. 933.

sary to discuss the few questions of law argued by the parties in their briefs.

On April 15, 1918, Rundel, who was an acquaintance and friend of Cook, at the latter's solicitation, loaned \$100 as a partial advance of \$1,000 which he agreed to make to Cook for the purpose of assisting Cook in the financing of his interest in a coal project. It was understood between Cook and Rundel that this coal project was ultimately to be incorporated by the parties interested, and this understanding was finally consummated by the creation, in August, of the Colville Valley Coal Company, the garnishee defendant herein. On April 15, Rundel took an assignment of all of Cook's interest in the coal project as collateral security for the advances to be made to Cook. These advances amounted to \$310, evidenced by notes due July 30 and September 1, until in the latter part of May or early in June, Cook, being desirous of raising an additional \$500, applied to Rundel for that sum, which Rundel advanced after having gone to the property and examined it. Thereafter, in the latter part of June or the first of July, Rundel, for the first time learning that Cook's financial craft was in the breakers, and that judgments in various amounts already were on record against Cook, procured an assignment from Cook of all his interest in the mining project and of his shares of stock in the company to be formed. This assignment was antedated to show its execution as of April 19. This assignment, upon its receipt by Rundel, was placed among Rundel's papers in Cook's safe in Cook's office, and was never presented to the Colville Valley Coal Company, which was organized on July 19, until after the writ of garnishment had been served in this action. Upon the formation of the company, Cook was entitled to several thousand shares of its capital stock, and Cook presented to the company a list of his credi-

July 1919]

Opinion Per MACKINTOSH, J.

tors to whom stock was to be assigned, and a memorandum showing the distribution of his shares in the corporation. This was dated August 7, and by its terms provided for the issuance to Rundel of 12,000 shares and to himself of 42,500 shares. Under the directions contained therein, the garnishee defendant issued a certificate for 12,000 shares to Rundel, and issued to the other creditors of Cook, who were named in the memorandum, the certificates called for, and a certificate for the balance of 42,500 shares was issued to Cook. Meetings of the stockholders and trustees of the garnishee defendant were held at various times after August 7, at which meetings Cook appeared and took part, representing himself to be the owner of the 42,500 shares. He entered into agreements pooling the stock, voted the shares at different meetings, and at no time did he or Rundel make known the fact, or claim the fact to be, that the 42,500 shares of stock were to be the property of Rundel.

It will be observed that the \$1,000 which Rundel was to advance has, as a matter of fact, never been advanced; that the instrument which he claims transferred to him all of Cook's interest was antedated, and was issued at a time when Rundel knew that Cook was being hard pressed by his creditors, and yet Rundel allowed Cook to have the stock issued in his own name and to use and vote it as he pleased, and never presented the assignment to the corporation, but was content to receive the certificate for 12,000 shares for which he, at the time of its receipt, cancelled the \$310 indebtedness and surrendered the notes, though at the time not yet due. The original assignment provided that Rundel might have the privilege of taking at least 10,000 shares to be applied upon the debt, and that the balance of Cook's interest in the coal project was to be held by Rundel only as security.

As we read these assignments and the testimony of the witnesses, it is clear to us that, for the \$310 advanced, Rundel was to receive and did receive, 12,000 shares of stock in full payment, and that, for the further advance of \$500, the 42,500 shares of stock were to be used as collateral security, although, for the purpose of frustrating other creditors, this understanding was, and is, misnamed an assignment and sale. Incidentally, it appears in the record that the 12,000 shares of stock have already more than compensated Rundel for his participation in the venture.

The plaintiff is entitled to a judgment showing that Cook is the owner of 42,500 shares of stock in the garnishee defendant, subject to the interest of Rundel represented by his loan of \$500. The cause is remanded for such further steps in conformity with this opinion as are necessary.

HOLCOMB, C. J., MITCHELL, and MAIN, JJ., concur.

[No. 15287. Department One. July 30, 1919.]

OWEN BIGLAN, *Appellant*, v. INDUSTRIAL INSURANCE
COMMISSION, *Respondent*.¹

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—AWARD FOR FURTHER ACCIDENT—STATUTES—CONSTRUCTION. Under Rem. Code, § 6604-5, subdivs. b., f. and g., defining permanent total disability and permanent partial disability, and providing that, should a further accident occur to a workman previously the recipient of a lump sum payment, his further compensation shall be adjusted with regard to the combined effect of his injuries, a workman suffering at different times two permanent partial disabilities, not classified as a permanent total disability, cannot recover compensation in excess of the \$1,500 maximum for partial disability; and his second award must be made in view of his past receipt of money under the act.

¹Reported in 182 Pac. 934.

July 1919]

Opinion Per MACKINTOSH, J.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered September 16, 1918, upon findings in favor of the defendant, sustaining an award for personal injuries, on appeal from the decision of the industrial insurance commission. Affirmed.

Gordon & Easterday, for appellant.

The Attorney General, and *D. E. Twitchell*, Assistant, for respondent.

MACKINTOSH, J.—For an injury sustained to the right eye in hazardous employment in 1913, the appellant received compensation under the workmen's compensation act, in the sum of \$625, his injury being classified as a permanent partial disability. While still engaged in a hazardous employment, in 1916, he sustained an injury to the right arm, also classified as a permanent partial disability, and the commission administering the workmen's compensation act allowed him compensation in the sum of \$1,250, but upon discovering that the appellant had theretofore received an injury classified as a permanent partial disability, cancelled the award of \$1,250 and made an award of \$875, being the difference between the \$1,500 maximum which the statute provided for permanent partial disability and the \$625 already received under the first classification.

Appellant, being dissatisfied with the award as finally made, appealed to the superior court, and from an unfavorable decision there, appealed to this court, urging that, under the workmen's compensation act of 1911, there could be more than one permanent partial disability which would entitle the workman to receive awards aggregating in excess of \$1,500.

Both injuries to the appellant having occurred prior to 1917, the question in this case is to be answered by a consideration of the compensation law as enacted in 1911; the particular portions of that act applicable to the situation being Laws 1911, p. 356, chapter 74, section 5, subdivisions b, f, and g (Rem. Code, § 6604-5).

Subdivision b declares:

“Permanent total disability means the loss of both legs, or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.”

Subdivision f:

“Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes”

Subdivision g:

“Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.”

Under this latter subdivision, where reference is made to an accident occurring to a workman who has been previously the recipient of a *lump sum* payment, and providing that, in the event of a further accident, the additional compensation shall be adjudged according to the combined effect of his injuries and his past receipt of money, there are but two classes of injuries, for the reason that the act provides the *lump sum* payments in two instances only; first, when the workman has suffered a permanent partial disability; or, second, where he has suffered a permanent total disability.

July 1919]

Opinion Per MACKINTOSH, J.

Reference to subdivision b will show that the legislature failed to classify an injury to the eye and an injury to the arm as permanent total disabilities. This was probably by oversight. After the receipt of the first injury, the appellant was a workman permanently partially disabled, and the second injury left him permanently partially disabled according to the classification of the act as it existed at that time, contemplating that a workman permanently partially disabled should receive compensation not in excess of \$1,500. It would have been well to have provided that the suffering of two permanent partial disabilities should be classified as a permanent total disability. But the legislature not having made this classification, we are not empowered to raise the maximum recoverable by the appellant because we feel that the act did not place it high enough. To attempt to do so would be to disregard what seems to be the plain language of the act, which, if it works unscientifically or unjustly, is a matter for legislative correction.

“The industrial insurance act is not one designed to award full compensation to each individual for all such damages as such individual would be entitled to in his peculiar circumstances, but is only a system of limited insurance whereby all industrial employees within the statute are paid definite but limited amounts for injuries, without regard, as we have said, to the particular individual circumstances or needs of the injured employee. The injury alone is the subject which can be considered by the commission under the statute, and applies to and covers all classes of injuries alike.” *Foster v. Industrial Insurance Commission*, 107 Wash. 400, 181 Pac. 912.

The compensation provided by the act is based and fixed upon certain schedules, and where the act, as it does in subdivision g, provides that one suffering a second permanent partial disability is to have his com-

pensation adjusted according to the combined effect of his injuries, and that combined effect is to still leave him classified as permanently partially disabled, his second award must be made in view of "his past receipt of money under this act"; and the appellant in this case, having received \$625 for his first injury, was entitled to no more than the difference between that and the maximum of \$1,500 for his second injury.

The decisions of the commission and the lower court are affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and TOLMAN, JJ., concur.

[No. 15315. Department Two. July 30, 1919.]

ANNA DOWNING, *Appellant*, v. PERRY A. DOWNING,
Respondent.¹

APPEAL (316, 317)—BILL OF EXCEPTIONS—CERTIFICATE AS TO ALL THE EVIDENCE. In the absence of a statement of facts certified to contain all the evidence, it cannot be said that the superior court abused its discretion in awarding the custody of children in a divorce action, or in refusing to modify the order, upon hearing an application considered to give opportunity for further evidence.

Appeal by plaintiff from a judgment of the superior court for Pacific county, Hewen, J., entered June 7, 1917, upon findings in favor of the plaintiff, in an action for divorce; also from an order entered June 16, 1917, denying modification of the decree respecting the custody of children. Affirmed.

Fred M. Bond, for appellant.

Welsh & Welsh, for respondent.

PARKER, J.—This is a divorce action. Mrs. Downing has appealed from the decree of divorce rendered

¹Reported in 182 Pac. 561.

July 1919]

Opinion Per PARKER, J.

therein by the superior court for Pacific county, and seeks reversal of that decree in so far as it awards the custody of two of the children to Mr. Downing; and has also appealed from an order entered by the same court, the same judge presiding, denying her application for a modification of the decree in that particular.

On June 7, 1917, at the conclusion of the trial of the main action upon the merits, the trial court made findings and conclusions, finding, among other things, "that each of them (Mr. and Mrs. Downing) is a fit and proper person to have the care and custody of the issue of their marriage." There are seven children, the issue of their marriage, the youngest of whom was, at the time of the trial, four months old, and the oldest of whom was then thirteen years old. On the same day of the making of its findings and conclusions, the court entered its decree of divorce, awarding the custody of five of the children to Mrs. Downing and awarding the custody of two of the children, aged seven and eleven years, respectively, to Mr. Downing. A few days following the entry of decree so disposing of the custody of the children, Mrs. Downing applied to the court for a modification of the decree in so far as it awarded the custody of the two children to Mr. Downing. This application came on for hearing before the court, the same judge presiding, which hearing resulted in the entry of an order by the court denying the application on June 16, 1917, which it will be noticed, was but nine days after the entry of the decree.

The record before us does not contain any statement of facts furnishing any information as to what evidence was introduced upon the trial of the main action. A bill of exceptions was settled and signed by the trial judge at the instance of counsel for Mrs. Downing, making of record in the case certain evidence introduced upon the hearing of her application for a modi-

fication of the decree. Even this bill of exceptions does not purport to contain all the evidence introduced upon that hearing. In its beginning, it states only that "the following proceedings and matters were had and occurred, and the following testimony introduced"; following which there are eleven typewritten pages of testimony, and concludes: "And because the foregoing matters and things do not all appear of record, the court has signed, sealed and certified the foregoing bill of exceptions." It is signed by the trial judge, but there is no certificate by the judge that it "contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein," (See Rem. Code, § 391), even as to matters and proceedings occurring upon the hearing of Mrs. Downing's application to modify the decree touching the custody of the two children.

This condition of the record renders it at once apparent that we are unable to say that the trial court abused its discretion in awarding the custody of the two children to Mr. Downing or in refusing to modify the decree. The record before us renders it plain that the hearing upon the application for a modification of the decree was considered by the court simply as giving Mrs. Downing an opportunity to introduce further evidence touching the question of the custody of the two children, such evidence to be considered with other evidence already introduced upon the trial of the main action but a few days before that hearing. There was some evidence introduced upon the hearing of Mrs. Downing's application for a modification of the decree, as shown by the bill of exceptions, from which it could be argued with some show of reason that the two children should have been awarded to her and not to Mr. Downing, but we have no way of knowing but what there was other evidence introduced upon the trial of

July 1919]

Opinion Per MACKINTOSH, J.

the main case, and even upon the hearing for modification of the decree, proper to be considered by the trial court, which would be ample to show that the court did not abuse its discretion in entering either the decree or the order refusing to modify the decree. No other question is presented by the assignments of error.

The decree and order are both affirmed.

HOLCOMB, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 15422. Department One. July 30, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Emma Wilkerson, Plaintiff*, v. THE SUPERIOR COURT FOR YAKIMA COUNTY *et al., Defendants*.¹

APPEAL (229) — EFFECT OF TRANSFER OF CAUSE — JURISDICTION ACQUIRED — CUSTODY OF MINOR CHILDREN. After appeal taken in a divorce case affecting the custody of children, the supreme court possesses sole power to make orders with reference to their custody; and the superior court will be prohibited from changing the custody through habeas corpus proceedings pending the appeal, where the supreme court, upon considering the merits, finds that the welfare of the children does not demand a change.

Application filed in the supreme court June 19, 1919, for a writ of prohibition to the superior court for Yakima county, Holden, J., to prevent the entering of an order in habeas corpus proceedings changing the custody of a minor pending appeal from an order modifying a decree of divorce. Granted.

Frank J. Allen, for plaintiff.

T. J. Casey, for defendants.

MACKINTOSH, J.—A decree of divorce was entered on April 12, 1915, by the terms of which there was awarded to the relator the custody of a minor daugh-

¹Reported in 183 Pac. 63.

ter and to the father the custody of two minor boys. On March 19, 1919, the relator filed a petition in the divorce action asking to have the decree modified so as to award her the custody of all three children, who, at the time of the filing of the petition, she had in her actual care and control. A restraining order was made prohibiting the father from interfering with this care and custody pending the determination of the petition, and on June 13, 1919, the petition was heard and the decree was modified so as to award to the relator the custody of the older boy and the girl and to award to the husband the custody of the other boy. The relator, being dissatisfied with this modification, gave notice of appeal, which was perfected by furnishing an appeal bond. Thereafter the father sued out a writ of habeas corpus, directed to the relator, for the purpose of securing the possession of the boy whose custody had been awarded to him by the original decree and re-awarded by the decree as modified. Upon the return of the writ, the relator filed a plea in abatement, upon the ground that an appeal had been perfected in the divorce action. This plea was denied by the trial judge, the defendant in this action, and thereupon this application was made here to prohibit the defendant from entering an order in the habeas corpus proceeding transferring the possession of the boy to his father.

This court has early decided, and consistently followed that decision, that, upon an appeal being taken from an order modifying a divorce decree, the fact of such appeal may be set up by plea in abatement in defense to a subsequent action by either of the parties seeking to have the custody of the children changed during the pendency of such appeal; that the supreme court, after the appeal has been taken, possesses the sole power to make orders with reference to the cus-

tody of the children, and that all applications for such change must be addressed to this court. *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Gust v. Gust*, 71 Wash. 75, 127 Pac. 566.

In *State ex rel. Davenport v. Poindexter*, 45 Wash. 37, 87 Pac. 1069, a writ of habeas corpus, applied for in the supreme court, was denied where the custody of a minor child had been awarded to the mother and appeal had been taken from that order and a supersedeas bond filed, the court holding that the filing of the supersedeas bond did not give the parties in whom the custody had rested at the time of the commencement of the action the right to resume such custody, since the welfare of the child was the primary consideration:

"In such a proceeding as this, we do not think the giving of a supersedeas bond has any effect whatever upon the possession, custody and control of the minor children in question. It being presumed that the order of the trial judge was correct, and that he was actuated by a consideration for the minors' welfare, it would be against public policy to have that welfare imperiled during an appeal, in the absence of a statute clearly permitting the staying of such orders. The trial court had jurisdiction to take said children into its possession, if it believed that their physical or moral welfare or other substantial interests necessitated such action. When the appeal was perfected, this court became invested with jurisdiction to make such orders as the welfare and necessities of said minors might demand. If, as contended by relator, the present situation of these minors is so unsuitable as to menace their physical or moral welfare or other substantial interests, the question of an appropriate change could doubtless be considered by this court upon a proper showing. *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123. But such a matter is not before us at this time. Relators are basing their right to the immediate possession of said children upon the supersedeas bond given as aforesaid. The giving of such bond does not entitle them to such possession."

This case, however, was distinguished and its operation restricted in the later case of *State ex rel. Clark v. Superior Court*, 90 Wash. 80, 155 Pac. 398, being a case very similar to the one now under consideration. There the custody of a child had been awarded to two persons for alternate periods, and an appeal had been taken to this court from that decree. The child was not delivered to the relator, who, according to the decree, was entitled to its possession on January 1, 1916. The relator then made application to the court for an order directing the compliance with that part of the decree which directed that the child should be placed in the relator's custody. The court refused to do this on the ground that it lacked jurisdiction, since the appeal was pending in the supreme court, and an application was then made in this court for a writ of mandate to compel the lower court to enforce its decree. We held:

"In the case at bar, an appeal is pending. The child is in the possession of the sister of the defendant, who has been found to be worthy. Whether the respondent had jurisdiction to execute his decree by ordering the child turned over to the parents of the relator is of little consequence; for granting, as the relator admits, that the jurisdiction to make any order for the protection and welfare of the child is in this court, and having jurisdiction in virtue of the petition of the relator, we shall, in the exercise of that jurisdiction, treat the refusal of the respondent as a finding that the welfare of the child will not be jeopardized by allowing it to remain where it is pending the appeal. The custody of the child being given to the parents of the relator, and to the sister of the defendant for equal and alternating periods, neither party can claim that the particular time in which they shall have such custody is of legal consequence. It does not go to *the welfare of the child*, and that is the only thing this court or the superior court will inquire into."

July 1919]

Opinion Per MACKINTOSH, J.

The law is, as we understand it, that, pending an appeal in such cases, the lower court has not jurisdiction to modify or alter the decree as it may relate to the custody of children, but that such application must be made to the supreme court, and that the giving of a supersedeas bond does not suspend the operation of the decree in actions of this character, as it relates to the custody of the child. The *Clark* case, above, having been an application for a writ of mandamus to compel the trial court to enforce its decree, and this court having treated the application as an original application in this court relating to the custody of the child, we may here treat this application for a writ of prohibition in the same manner and, as in the *Clark* case, determine from the record that there is no serious question concerning the worthiness of the mother or father, the trial court having seen fit to award children to each of them, and, pending the hearing, allowed the relator to have all the children in her care and keeping. In the *Clark* case, the relator was attempting to enforce the decree by applying for an order compelling its observance, while in this case the same result is sought to be obtained by means of a writ of habeas corpus while the appeal is pending. In neither case could the trial court take any further steps in regard to the custody or control of the child, no matter what the form of the proceeding in which such steps were sought to be taken. The writ of habeas corpus, as it may refer to the custody of minor children, does not involve the question of personal freedom, and the court in passing upon such writs is dealing with a matter of an equitable nature and is not bound by a purely legal right, but is called upon to give consideration to claims founded on human nature and such claims as are just and equitable, having in

view the welfare of the child. The fundamental idea of the writ of habeas corpus is to set at large those who are illegally restrained of their liberty, but when the subject of the writ is a child, the court is not to stop with the mere removal of the illegal restraint, but can go further and transfer the custody from one person to another. These are matters which are left in the discretion of the court seeking to promote the well-being of the child. The trial court, not having power to change the decree during the appeal, the application for the writ should have been presented to this court. This court has exclusive jurisdiction and was the forum in which any proceeding should be instituted which affected the question we are here discussing. Considering this as an application here, what we have said in regard to the fitness of the parties would be determinative of the matter, and the record disclosing no condition inimicable to the welfare of the children, all parties interested should remain in the position in which they were when the appeal was taken.

The writ of prohibition is granted.

HOLCOMB, C. J., MAIN, TOLMAN, and MITCHELL, JJ.,
concur.

July 1919]

Syllabus.

[No. 15123. Department Two. July 30, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
MARY SWARTZ, *Appellant*.¹

CRIMINAL LAW (385)—APPEAL—NECESSITY OF OBJECTIONS—INFORMATION. Objections that an information is duplicitous and too uncertain cannot be first made in the supreme court.

HOMICIDE (69)—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY. In a prosecution for homicide by performing an abortion, a dying declaration of the deceased on the evening of her death is admissible where it states that she consulted and was treated by the defendant, for that purpose, that defendant used a catheter and made deceased feel pretty sick, and knew what she was doing.

SAME (69). Where such declaration contains statements relating to the acts of another in no way connected with the *res gestae*, they should be stricken.

SAME (69). The statement that deceased heard defendant tell another over the phone what she had done is admissible not as part of the *res gestae*, but as an admission of the accused.

SAME (70). A dying declaration made nine days subsequent to entering a hospital and in a sense recitals of a past event is admissible, when it but describes links in the chain of criminal conduct that was not complete until death was accomplished by the illegal operation.

CRIMINAL LAW (158)—EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS. In a prosecution for homicide by performing an abortion, it is proper to allow physicians to testify, in answer to questions fairly summarizing the facts which the state's evidence tended to prove, that the proximate cause of death was the act of the defendant in introducing a catheter into the uterus of a pregnant woman.

HOMICIDE (89)—TRIAL—RECEPTION OF EVIDENCE—DYING DECLARATIONS. In a prosecution for homicide, the accused is entitled to display to the jury the proven signature of the deceased to a dying declaration, where it was on a sheet separate and apart from the declaration itself and could not confuse the jury.

CRIMINAL LAW (358-1) — HOMICIDE (127) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF WITNESS. In a prosecution for homicide in performing an abortion, it is an abuse of discretion to refuse a new trial for newly discovered evidence tending to show

¹Reported in 182 Pac. 953.

that the deceased's dying declaration as to defendant's use of a catheter was false and that the mother of the deceased had given false testimony upon a material point, and had she testified to the truth, the jury might have reached a different conclusion.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered June 28, 1918, upon a trial and conviction of manslaughter. Reversed.

W. C. Donovan, Geo. H. Armitage, Robertson & Miller, and Turner, Nuzum & Nuzum, for appellant.

John B. White, H. G. Kinzel, and Fred J. Cunningham, for respondent.

HOLCOMB, C. J.—Defendant was found guilty of manslaughter under an information charging that, through the performing of an abortion not necessary to the preservation of the life of the child or of the pregnant woman, she caused the death of the patient. Defendant unsuccessfully interposed a motion for new trial, and from judgment upon the verdict, she appeals.

After the appeal was perfected and just prior to the submission of the appeal in this court, Messrs. Turner, Nuzum & Nuzum, new counsel for appellant, who had not participated in the trial or proceedings theretofore, filed an application asking leave to assign as a new ground of error not assigned in the original assignments of error by appellant, that the court below erred in overruling the demurrer of appellant to the information. The ruling upon this matter was reserved until consideration of the case upon the merits, and respondent was given an opportunity and time to furnish a memorandum of authorities in resistance of the application and as to the question of the sufficiency of the information. However, we do not find anywhere in the record any demurrer to the information in the court below, nor any order of the court below overruling a demurrer. While it is generally accepted that

July 1919]

Opinion Per HOLCOMB, C. J.

an information or indictment may be attacked for the first time on appeal on the ground that it does not charge any facts sufficient to constitute a crime, that rule does not apply to an objection to an information upon the ground that it does not substantially conform to the requirements of the code, or that more than one crime is charged, or that the information contains matter which, if true, would constitute a legal defense or bar to the action. The attack, upon this attempted new assignment of error, is upon the ground that the information is duplicitous in charging more than one crime, and is too uncertain as to which crime was intended to be charged to satisfy the requirements of the law. For the above reasons, we conclude that we cannot consider this attempted new assignment of error.

The evidence is in sharp conflict. In her defense, appellant introduced evidence that, about November 1, 1917, a man unknown to her called at her office and requested treatment for a girl who was in trouble; that she declined, and a day or so later he returned with Fay Hamilton, whom he introduced as his niece, but he was ordered from the office, but returned alone the following morning in quest of advice as to a private sanitarium in which to place his niece. Among the places mentioned was that of Mrs. Williams, located near appellant's residence. At 8 p. m. Friday, November 9, 1917, Mrs. Williams requested appellant to stop in at the sanitarium on her way home. Appellant arrived at the hospital about 8:20 p. m., and was taken to a room in which were Fay Hamilton, Mrs. Flora Hamilton (the girl's mother), Mrs. Hindes and Mrs. Williams. The girl's mother at that time informed appellant that the daughter was wayward; that she had told her mother that she had been operated on by a soldier; that she had operated on herself; that a cer-

tain physician had given her pills, and that she had been taking turpentine. Appellant made no examination of the girl, nor did she treat or prescribe for her in any manner, remaining only about fifteen minutes at the sanitarium.

The girl's mother testified that she did not know until Sunday afternoon, November 11, that her daughter was in the sanitarium, and the next morning, November 12, she took her daughter home; that appellant was not at the sanitarium and that she saw no one but the nurse; that she never conversed with appellant nor saw appellant to know her before the trial, and that she (the mother) was at the sanitarium only on the evening of November 11 and the morning of November 12.

There was evidence that, when the girl was brought to the sanitarium on Friday evening by her mother and Mrs. Hindes, she was "flowing"; that no medicine was administered; that, when on Sunday the mother made telephonic inquiry as to the condition of her daughter, the calling of a physician was advised. Dr. Loffler called between six and seven p. m. Sunday and curetted the patient's uterus. He also attended her a few days following at her home. Sunday evening, November 18, Dr. Sutherland was called to the girl's home, where he wrote what was offered in evidence as the dying declaration of Fay Hamilton. The girl died that night.

Appellant assigns as error the admission in evidence of the dying declaration, the admitted portion of which is as follows:

"I went to Dr. Swartz first. She used a catheter. This was out at the nurse's place on Broadway and Elm. I stayed there from Friday night till Monday. Called Dr. Loffler up Sunday night and he used a douche. He put some stuff in my arm. He gave me an anesthetic. He told me he was going to give me a

July 1919]

Opinion Per HOLCOMB, C. J.

douche. I don't know what was done. I was all right when I went to Dr. Swartz and I knew I was pregnant about four months and asked her to get rid of it. I felt pretty sick when they brought me home on Monday. I had a chill on Sunday night. Dr. Swartz knew what she was doing. I heard Dr. Swartz tell Dr. Loffler over the phone what she had done."

The proper foundation having been laid, this declaration was clearly admissible with certain exceptions. The statements: "Called Dr. Loffler up Sunday night and he used a douche. He put some stuff in my arm. He gave me an anesthetic. He told me he was going to give me a douche. I don't know what was done," all clearly relate to the acts of another than the accused, with whom she was in no way connected, form no part of the *res gestae*, or declarations as to the acts and conduct of the accused, and were clearly improper. They should have been stricken. We cannot consider them as having been presumptively prejudicial to the appellant and would not reverse the judgment upon the admission of them alone. Upon a new trial, however, the above portion should be excluded.

"Dying declarations are statements of material facts concerning the cause and circumstances of the homicide. . . . They are restricted to the act of killing, and to the circumstances attending it, and form part of the *res gestae*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately connected with the declarant's death, they are inadmissible." *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297.

Facts, and not conclusions, opinions or inferences, are admissible as dying declarations, just as in non-expert testimony of a living witness, and more particularly so because the deceased cannot be observed or subjected to cross-examination. *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *State v. Center*, 35 Vt.

277; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139; 1 Greenleaf, Evidence, § 156.

Tested by these rules, the declarations properly admissible are: "I went to Dr. Swartz first. She used a catheter. This was out at the nurse's place on Broadway and Elm. I stayed there from Friday night till Monday. I was all right when I went to Dr. Swartz and I knew I was pregnant about four months and asked her to get rid of it. I felt pretty sick when they brought me home on Monday. I had a chill on Sunday night. I heard Dr. Swartz tell Dr. Loffler over the phone what she had done." This last statement being admissible, not as a part of the *res gestae* properly, but as a statement of an admission or declaration by the accused, which would be proper evidence on the part of a witness thereto on the stand in and connected with her acts. Although the statements of deceased were made approximately nine days subsequent to the time she entered the hospital, and in a sense are recitals of a past event, they but describe links in the chain of criminal conduct which was not complete until her death was accomplished by reason of the illegal operation. Her statement that "I felt pretty sick when they brought me home on Monday. I had a chill on Sunday night. . . ." tends to show that the operation described by her had been performed.

Appellant also complains of rulings of the court on certain questions put to Drs. Sutherland and Epplen and the answers given by them as experts. Dr. Sutherland was permitted to testify, over objection, that, taking into consideration the conversation he had with Fay Hamilton and which he reduced to writing, and from what he observed at the autopsy, the immediate cause of the girl's death was blood poison or septicemia, the result of a criminal abortion. The word "criminal" was stricken from the answer. He further

July 1919]

Opinion Per HOLCOMB, C. J.

testified that, in his opinion, taking the matter of the dying declaration and what he observed at the autopsy, as well as the conversation had with deceased when she was making the dying declaration, the proximate cause of the contracting of the blood poison was the insertion of a dirty catheter into the uterus; that he based his statement upon the dead girl's dying statement that she had a chill.

Dr. Epplen was asked:

"Assuming that on the 9th day of November, 1917, Fay Hamilton was in good health, was four months pregnant, that a catheter was used upon her to produce an abortion, that subsequently to that, on Sunday, she had a chill, that thereafter a currettement was performed to remove pieces of afterbirth, and that thereafter she died on the 18th day of November; now assuming that all those facts which I have related or told you, and basing your opinion upon those facts and what you discovered at the autopsy performed on the 19th day of November, 1917, what in your opinion would you say was the proximate cause of the death of Fay Hamilton?"

He replied that,

"I believe the proximate cause is that thing which necessitated the treatment and which produced the miscarriage and the infection afterwards, namely the introduction of a catheter into the uterus of a pregnant woman."

The questions complained of fairly summarized the facts which the state's evidence tended to prove. The assignment is not meritorious. As we said in *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626:

"True the question embodied the very fact that was ultimately to be found by the jury, but this does not render it incompetent. To reach their final conclusion the jury were compelled to draw an inference from the facts proven which involved a question of medical science; that is to say, after all of the facts had been

given in evidence, it was still a question whether the disease could be communicated in the manner recited, and as that question involved a matter of medical science, it was proper to submit to the jury on the question the opinion of an expert versed in that science."

Contention is also made that it was prejudicial error for the court to refuse permission to exhibit to the jury the proven signature of the deceased to the dying declaration. This admitted evidence was desired as tending in some degree to show the physical and mental condition of the girl at the time of the declaration. While this, standing alone, may not be so weighty and prejudicial as to constitute reversible error, yet as the case must be remanded for a new trial on another ground, for the guidance of the trial court in case another trial is had, it is advised that appellant was entitled to display to the jury the signature of the deceased, inasmuch as that signature was on a sheet of paper separate and apart from the declaration itself and could not in anywise confuse the jury. While the value of such evidence to the appellant is doubtful, yet she was within her rights in insisting that the signature be shown to the jury. This is no impingement of the rule announced by this court in *State v. Moody*, 18 Wash. 165, 176, 51 Pac. 356, that it is error to permit the dying declaration of deceased to go to the jury room for investigation by the jury.

Appellant insists that her motion for a new trial should have been sustained. She offered in support of the motion affidavits, which were not controverted, that the testimony of the girl's mother that she was not at the sanitarium prior to November 11 and did not accompany her daughter to the hospital the preceding Friday was false. It is practically admitted here that her testimony in this regard was untruthful.

July 1919]

Opinion Per HOLCOMB, C. J.

“Where there was no reason to suspect certain testimony to be perjured, and no laches is shown, the courts will generally grant a new trial if, after the trial, evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony.” 20 R. C. L., p. 299.

Mrs. Hamilton, the mother of the girl, sat in the court room during the whole of the trial, while other witnesses were excluded. In her testimony she testified that, so far as she knew, the health of her daughter was good up to the time she went to the Williams' Sanitarium; that she knew nothing of her going there; that she was not with her when she went. One of the affidavits offered by appellant in support of her motion for new trial as to newly discovered evidence, was that of Mrs. Maude Hindes, a neighbor and friend of the Hamiltons, who was present at the time of the dying declaration of Fay Hamilton and who signed the instrument written by Dr. Sutherland as a witness, and testified at the trial as a witness for the state that she witnessed the dying declaration. It was not discovered until after the trial that she herself was the woman who went with Mrs. Hamilton and Fay to the Williams' Sanitarium on Friday, November 9, and that she did so at the request of Mrs. Hamilton and Fay. This naturally tends to show that Mrs. Hamilton knew, on November 9, that Fay was not in good health, the nature of her condition and her purpose in going to the Williams' Sanitarium, and this testimony was concealed, or at least not produced by the state at the trial. There was no evidence whatever that appellant had used an instrument upon the girl at her office down town, as sought to be established circumstantially and argued to the jury by the prosecution, but in the dying declaration as written by Dr. Sutherland, there was the statement that Mrs. Swartz “used a catheter. This was out at the nurse's place on Broadway and Elm”

(referring to the Williams' Sanitarium). The only time this could have taken place was Friday, November 9. At that time the mother of the girl and Mrs. Hindes were with the girl all the time that appellant was present after the girl arrived there, and Mrs. Hindes, in her affidavit introduced on the motion for new trial, deposed that no instrument of any kind was used while she was there, and that she would not have permitted any such use. If this last statement is true, then Mrs. Swartz could not have used the instrument at the time stated, and appellant was entitled to a new trial for the purpose of introducing that evidence, together with other evidence that had been discovered after the trial, as shown by affidavits in the record, as to facts of which she had no knowledge prior to the trial, tending to show her innocence. Had Mrs. Hamilton testified to the truth, or not testified at all, the jury might have reached a different conclusion. The testimony of Mrs. Hindes was not merely cumulative. It was the disclosure of a witness to a very material fact favorable to the defense, of which the defense was ignorant, and was contradictory of material evidence by one of the principal witnesses for the prosecution. The credibility of the whole thereof is a question for the jury.

For these reasons, we are convinced that the court abused its discretion in denying a new trial.

Other errors are assigned by appellant, some of which are near akin to prejudicial error, but in view of the fact that the case is reversed and remanded for a new trial, they will probably not arise upon a retrial of the case, and we are not inclined to discuss and pass upon the same.

For the reasons heretofore stated, the judgment is reversed and the case remanded for a new trial.

FULLERTON, MOUNT, PARKER, and BRIDGES, JJ.,
concur.

July 1919]

Opinion Per MAIN, J.

[No. 15241. Department One. July 31, 1919.]

H. C. BROMLEY *et al.*, Respondents, v. HEFFERNAN
ENGINE WORKS, Appellant.¹

DAMAGES (15)—BREACH OF CONTRACT—PROSPECTIVE PROFITS. Prospective profits which a builder would have made upon a building contract are not speculative and therefore may be recovered if proven with reasonable certainty.

DAMAGES (118)—BUILDING CONTRACTS—PROSPECTIVE PROFITS—EVIDENCE. Prospective profits upon a building contract, breached by the owner, are sufficiently proven where it appears that the parties contemplated a profit of 10%, and expert witnesses testified that, considering the plans, cost of labor and material, and local conditions, a profit of 10% would have been made.

APPEAL (448, 449)—REVIEW—HARMLESS ERROR. Error in the form of a question permitting experts to state the amount of prospective profits is not prejudicial where it appears that they estimated the profits at the difference between the contract price and what it would cost to perform the contract.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 23, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Bronson, Robinson & Jones, for appellant.

Ralph S. Pierce, for respondents.

MAIN, J.—The purpose of this action was to recover damages for breach of a building contract. The cause was tried to the court and a jury, and resulted in a verdict for the plaintiffs. The defendant interposed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, both of which were overruled. Judgment was entered upon the verdict, and the defendant appeals.

The respondents are copartners doing business under the firm name of Hull Building Company. The

¹Reported in 182 Pac. 929.

appellant is a corporation with its principal place of business in Seattle, Washington. During the month of May, 1918, the appellant contracted with the respondents to erect for it a certain building, and breached the contract before its performance was entered upon. At least from the evidence, the jury had a right to find that the contract was made and breached. The verdict of the jury upon this question is accepted by the appellant so far as the appeal is concerned, but it is claimed that the respondents failed in their proof of damages.

The only question here is whether the proof was sufficient to carry the question of damages to the jury. The appellant claims that the damages, if any, were remote and speculative, and therefore the proof would not sustain the verdict and judgment. It is further claimed that, in any event, the damages were not proven in a proper manner.

This court has adopted the rule that, upon the breach of a contract, prospective profits may be recovered as damages, provided they can be proven with reasonable certainty, but that damages which are remote and speculative cannot be recovered. *Cuschner v. Pittsburgh-Hickson Co.*, 91 Wash. 371, 157 Pac. 879.

Upon the trial, the contract price of the building was shown, and it was also shown that, at the time the contract was made, it was within the contemplation of the parties that the respondents would make a profit of ten per cent of the contract price. Witnesses who had been engaged in the contracting business for many years testified, over objections, that, taking into consideration the plans for the building, the cost of labor and material and local conditions, the respondents, had they been permitted to perform the contract, would have made a profit of ten per cent.

July 1919]

Opinion Per MAIN, J.

The evidence offered in proof of damages is not substantially different from that in the case of *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490. In that case the plaintiff had contracted to remove certain timber of which the defendant was the owner. The latter breached the contract, and the action was brought to recover damages for the loss of profits which would have been realized had the contract been performed. There a number of witnesses, who were qualified as competent timber men and who knew local conditions, were permitted to testify as to what it would cost to log the land and how much it would cost to perform certain parts of the work, such as felling, bucking and swamping. From this evidence, the case being tried to the court, it was found that the plaintiff would have made a profit. It was there said:

"To ascertain the cost of performing any contract so as to arrive at the measure laid down in the above cases [which is the rule above referred to], resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions. . . . Such evidence is received upon the theory that it is the best evidence obtainable. Consequently men who know conditions, and have dealt in commodities, lands, or manufactured goods, are constantly called upon to advise courts and juries as to cost and value."

It cannot be held that the profits which would have been made upon the building contract, had it been performed, are remote and speculative and, therefore, incapable of proof. Such a doctrine applied to the extensive business of contracting would be an anomaly in the law. No case so holding has been called to our attention.

But in this case it is said that the witnesses were asked the direct question as to what the amount of

profits would be, rather than the cost of the construction of the building, taking into consideration the price of labor and material and the local conditions. It is true that the form of the question propounded to at least two of the witnesses is subject to this objection, but it does not necessarily follow that the judgment should be reversed because the questions were improper in form, if they were not improper in substance.

Reading the testimony, it is plain that the witnesses, in answering the question, were taking into consideration the contract price, the cost of labor and material and the local conditions, and estimating the profits at the difference between the contract price and what it would cost to perform the contract.

We think the evidence offered in this case comes within the rule of reasonable certainty, and that, therefore, the judgment should be sustained.

Affirmed.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

July 1919]

Statement of Case.

[No. 15337. Department Two. July 31, 1919.]

B. A. KONICK, *Appellant*, v. WELDON V. CHAMPNEYS,
Respondent.¹

PLEADING (90)—DEMURRER—SEPARATE CAUSE OF ACTION. A demurrer for improperly uniting two causes of action, must, under Rem. Code, § 259, subd. 5, be sustained, unless the complaint did not state sufficient facts to constitute one of the causes attempted to be stated.

ASSAULT AND BATTERY (2)—PLEADING—COMPLAINT. A complaint for assault and battery states a cause of action where it alleges that the owner of an apartment house wantonly and unlawfully assaulted and beat the plaintiff, a grocer, when he attempted to make delivery of goods sold to the defendant's tenant.

LANDLORD AND TENANT—INJUNCTION—RIGHTS OF THIRD PERSONS—INVITEE. A grocer delivering goods to tenants in an apartment house is an invitee as distinguished from a licensee, and has the right to use the entrance-ways to the building, and can enjoin the landlord from interfering with such right of entry.

INJUNCTION (49)—PLEADING—INTERFERENCE WITH WAY. A complaint for an injunction is sufficient where, although somewhat meager, it alleges that the defendant wrongfully refuses to allow the plaintiff to enter defendant's apartment house for the purpose of making delivery of goods sold to tenants in the building.

ACTIONS (23)—JOINDER OF CAUSES—"SAME TRANSACTION." A cause of action for an assault and battery upon a grocer while entering the defendant's apartment house to deliver goods does not arise out of the "same transaction," within Rem. Code, § 296, and therefore cannot be united with a cause of action to enjoin interference with plaintiff's right of entry.

Appeal from a judgment of the superior court for King county, Hall, J., entered January 22, 1919, upon sustaining a demurrer to the complaint, dismissing an action for an injunction and for damages. Affirmed.

Million & Houser, for appellant.

George B. Cole and *John Wesley Dolby*, for respondent.

¹Reported in 183 Pac. 75.

FULLERTON, J.—To the complaint of the plaintiff in this action, the defendant interposed a demurrer on the grounds (1) that several causes of action have been improperly united, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, whereupon the plaintiff elected to stand thereon and not plead further. The court then entered a judgment dismissing the action with costs, from which judgment the plaintiff appeals.

The complaint, omitting the formal parts, is as follows:

“(1) That, at all the times hereinafter mentioned, the plaintiff has been, and is now, engaged in the occupation and business of carrying on and conducting a retail grocery store at 277 Bellevue Ave., North, in Seattle, King county, Washington.

“(2) That, at all the times hereinafter mentioned, the defendant is the owner, manager and has charge of that certain apartment house known as the ‘Carlyle Apartments,’ situated at 320 Summit Ave., North, in the city of Seattle, King county, Washington.

“(3) That heretofore on the.....day of October, 1917, the plaintiff received by phone, an order from one of the tenants or occupants of the apartments in said Carlyle apartment house for groceries, and the plaintiff answering said call and order, went personally to said apartment house for the purpose of making delivery of said groceries, whereupon the defendant met the plaintiff at the rear entrance of said apartment house, the same being the customary place for the delivering of such articles as groceries, and thereupon the defendant did, in a rude, insolent, angry and contemptuous manner forbid plaintiff entering said apartment house or making said deliveries, and did wantonly, recklessly and unlawfully then and there assault, beat and bruise the plaintiff, by shaking him, pulling his ears and talking to him in a loud, insolent and boisterous manner, and did with force prevent the plaintiff entering said premises and apartment house.

July 1919]

Opinion Per FULLERTON, J.

“(4) That by reason of the said conduct of the said defendant, plaintiff suffered great pain and anguish of body and mind, all to his great damage in the sum of five hundred (\$500) dollars.

“(5) That the plaintiff has several customers in said apartment house, and at whose invitation the plaintiff is anxious and willing to sell his goods, wares and merchandise, but that the defendant wrongfully refuses to allow the plaintiff to enter upon said premises, or to deliver groceries to his tenants in the said apartments, and threatens to do the plaintiff great bodily harm should he attempt to make delivery thereof, thereby damaging plaintiff's business, but such damages are uncertain and difficult to ascertain and are, therefore, irreparable.

“Wherefore, plaintiff prays for a judgment and decree of this court as follows:

“First: Awarding plaintiff damages in the sum of five hundred (\$500) dollars.

“Second: For a permanent injunction enjoining the defendant from in any manner interfering and molesting plaintiff or preventing him from making deliveries of groceries in the usual, customary and ordinary manner to tenants in said apartment house, and that plaintiff have any other and further and different relief to which he may be entitled.”

The record does not disclose the grounds upon which the trial court sustained the demurrer. A due determination of the issue joined, however, requires a consideration of both of the grounds stated therein. There was plainly an attempt to state two causes of action. If, therefore, the pleader succeeded in stating two causes of action and these causes are improperly united, the demurrer was rightly sustained, since the code expressly makes the improper uniting of two or more causes of action a ground for demurrer. Rem. Code, § 259, subd. 5. If, on the other hand, the pleader stated one good cause of action but failed in his facts as to the other, it was the duty of the court to overrule

the demurrer and retain the case for trial upon the cause of action well stated. The allegations made in the attempt to state the other cause of action would be irrelevant and redundant matter, which it is the office of a motion, not a demurrer, to reach. Rem. Code, § 286.

The first question to be considered then is, are there two causes of action stated in the complaint. That there is a cause of action stated for personal injuries arising from an assault and battery, can hardly be doubted. The allegations are that the appellant, a grocer, received an order for groceries from a tenant in the respondent's apartment house; that he went personally to the apartment house to make delivery of the groceries, and was met by the respondent at the rear entrance to the house, the same being the customary place for the delivery of such articles as groceries, and was there wantonly and unlawfully assaulted and beaten by the respondent, to his damage in a stated sum of money. There is nothing to show that he had been theretofore forbidden to enter the premises for the delivery of groceries, or that he was acting otherwise than in an orderly and peaceful manner. Plainly, therefore, he had an implied license to enter for the purposes intended, or, at least, was not a trespasser in so doing, and the respondent had no cause to assault and beat him for making the attempt. More than this, it is alleged that the assault was wanton and unlawful. If this be true, and for the purposes of the demurrer it must be so considered, the assault gave rise to a cause of action, even though the attempt to enter the building to deliver the groceries was wrongful, since these words negative the presumption that the assault and battery may have been necessary to prevent a wrongful act.

July 1919]

Opinion Per FULLERTON, J.

Is there stated a cause of action for injunctive relief?

It is a well settled rule that, when the owner of a building fits it up for business or office uses and leases rooms therein to tenants, retaining control over the entrance-ways to such rooms, he impliedly invites all persons to enter the building whose entry is naturally incident to the business carried on by the tenant.

“The rule of implied invitation may be stated as follows: Invitation as distinguished from mere license is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor’s business relates.” *Gasch v. Rounds*, 93 Wash. 317, 160 Pac. 962.

It is a well settled rule, also, that the duty of care which the owner of such a building owes to invitees differs from the duty of care he owes to a mere licensee. If the building be open and there is nothing to indicate that strangers are not wanted, any person may enter without becoming a trespasser, but the owner owes him no duty of care other, perhaps, than the negative one of not wantonly injuring him. To the invitee, however, he owes the same duty of care that he owes to the tenant; he must keep the ways reasonably safe for him and must permit entry at all reasonable hours. *Gasch v. Rounds, supra; Stanwood v. Clancey*, 106 Me. 72, 75 Atl. 293, 26 L. R. A. (N. S.) 1213.

The rule presupposes, of course, that the invitee enters at a reasonable hour, conducts himself in an orderly manner, and, as said in the case cited from this court, enters on some business in which the tenant has an interest. In the case where the tenant is a lawyer, doctor, architect, or other professional man, the rule would include a person who enters to consult

him on professional business, and in the case of a manufacturer of or dealer in commodities, would include a person entering for the purpose of dealing with relation to such commodities. It would not, however, include a peddler or solicitor, or a person seeking a purchaser for something he had to sell. Such persons, even if they are expressly permitted to enter onto the premises, are mere licensees, and their right of entry is subject to be revoked by the owner at any time and for any cause that may seem to the owner sufficient.

It follows from these principles, we think, that an invitee has privileges in the premises which he can enforce in his own right. Certainly, under all of the cases, he can recover for personal injuries suffered by him caused by the negligence of the owner; and it would seem equally plain that, if his right of entry is wrongfully interfered with by the owner, he can have, at least as the practice is administered in this state, injunctive relief against the denial of the right.

The legal status of the owner of an apartment house is not essentially different from that of the owner of office or business buildings generally. Such a house has been defined as a building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light or elevator services, in common to all families occupying the building. *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742. The owner of such a building, when he leases the rooms therein for the purposes intended, confers rights in the tenants not only in the rooms actually leased, but rights in the common entranceways to such rooms, notwithstanding he may have retained control of them for the common use of all of his tenants. Since the leasing is for housekeeping pur-

July 1919]

Opinion Per FULLERTON, J.

poses, among these rights is the right to carry through such entrance-ways the commodities necessary for the sustenance of the tenants. Having this right, the tenant can, in the absence of a special covenant to the contrary, confer it upon another, and that other, when the right is so conferred, becomes an invitee of the owner. The rule applies to a grocer from whom groceries are ordered, when ordered with the understanding or agreement that they shall be delivered. He has business with an occupant of the building, in which business the occupant has an interest. It is not, of course, intended to be said that the owner of an apartment house may not make reasonable regulations governing the use of the entrance-ways to the building. He may, as he seems to have done in this instance, provide a place for the delivery of commodities to his tenants, and require such commodities to be delivered at that place, and, as before indicated, can require entrance to be made at reasonable hours and in an orderly manner; and it may be, also, that, for just cause, he can forbid a particular person or particular persons from entering. But the regulations must be reasonable, they must not be so stringent as to amount to a practical denial of the right.

In the light of these considerations, we think the complaint, although somewhat meager in its allegations, states facts sufficient to sustain a judgment awarding injunctive relief. The complaint, therefore, states two causes of action, and the question arises, are they improperly united. The appellant argues that they are not, and calls to his assistance that section of the code which permits two or more causes of action to be united in one complaint when they arise out of the same transaction. Rem. Code, § 296. But we cannot think the statute aids the appellant. Discussing this provision of the statute, Mr. Pomeroy, in

his work on Remedies and Remedial Rights (3d ed.), § 474, says:

"It is clear that every event affecting two persons is not necessarily a 'transaction' within the meaning of the statute; indeed, the word as used in common speech has no such signification. 'Transaction' implies mutuality, something done by both in concert, in which each takes some part. Much less can it be said that, because two events occur to the same persons at the same time, they are necessarily so connected as to become one transaction. The case cited above, in which a cause of action for an assault and battery and one for a slander were united, illustrates this statement. Two events happened simultaneously, the beating and the defamation, but neither was a 'transaction' in any proper sense of the word. The wrong which formed a part of one cause of action was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time; but this unity of time was certainly not a 'transaction.' Much of the difficulty in construing this language has resulted, I think, from a failure to apprehend the true nature of a 'cause of action,' from a forgetfulness that it includes two factors.—the primary right and the wrong which invades it. A 'cause of action' cannot be said to 'arise out of' an event, when the event produces or contains but one of these factors,—the delict or wrongful act."

The case referred to in the quotation is *Anderson v. Hill*, 53 Barb. (N. Y.) 238. The complaint united a cause of action for an assault and battery and one for slander, alleging that the defamatory words were uttered while the beating was in actual progress. To a demurrer for a misjoinder, it was answered that both causes of action arose out of the same transaction. Passing upon the question, the court said:

July 1919]

Opinion Per FULLERTON, J.

“It is claimed, however, by the plaintiff’s counsel, that the assault and battery, and the slander arose out of the same transaction, inasmuch as both causes originated or occurred, at the same period of time, and therefore both belong to the first class. This is what is held in *Brewer v. Temple*, (*supra*.) But it by no means follows that because the two causes of action originated, or happened, at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs, is the beating, the physical force used; while the transaction out of which the cause of action for slander springs, is not the beating, or the force used, but defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction. It has been held that a contract of warranty and a fraud practiced in the sale of a horse, at the same trade, did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable. (*Sweet v. Ingerson*, 12 How. Pr. 331.) This was a general term decision, and of course as authority, has greater weight than that of *Brewer v. Temple*. Assault and battery and slander are as separate and distinct causes of action as any two actions which can be named. True they are both torts, but they do not belong to the same category or class, either at common law or by the Code. Indeed the Code, in express terms, enumerates and classifies them separately. The subjects of the two actions are not connected with each other. Each subject of action is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprung into existence at the same moment of time. Time has very little to do in solving

the real question. The question is, did each cause of action accrue or arise out of the same transaction, the same thing done? It is apparent that each cause of action arose, and indeed must necessarily have arisen out of the doing of quite different things, by the defendant. Different in their nature, and all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain either cause of action, and they may require different answers."

Within the principles here announced, the complaint plainly improperly unites two causes of action; and since the code, as we have shown, makes the improper uniting of two or more causes of action a distinct ground of demurrer, the demurrer was properly sustained.

The judgment is affirmed.

MOUNT and PARKER, JJ., concur.

[No. 15366. Department One. July 31, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Paul Luketa et al., Plaintiff*, v. JOHN S. JUREY, *as Judge etc., Respondent*.¹

MANDAMUS (19)—JUDICIAL PROCEEDINGS—EXERCISE OF DISCRETION. Mandamus does not lie to compel the superior court to enter judgment upon a remittitur where the supreme court did not direct a specific judgment, but the direction given was only such as the law gives, and the superior court was not refusing to exercise its discretion or proceed to a final determination of the case; since mandamus does not lie to control discretion or review error.

Application filed in the supreme court May 6, 1919, for a writ of mandamus to compel the superior court for King county, Jurey, J., to sign proposed findings, conclusions and judgment in an action of replevin. Denied.

¹Reported in 182 Pac. 932.

July 1919]

Opinion Per MAIN, J.

Van C. Griffin and Benj. S. Ohnick, for relators.

Piles & Halverstadt and W. P. Bell, for respondent.

MAIN, J. — This is an original application in this court for a writ of mandamus. In the *American Packing Co. v. Luketa*, 98 Wash. 6, 167 Pac. 87, the plaintiff brought an action in replevin to recover the possession of a fishing boat known as the Boston II. In that action, as originally instituted, Paul Luketa alone was named as a defendant. After the action had been begun, Sam Luketa intervened, claiming to be the owner of an undivided one-half interest in the boat. After the issues were framed, the cause went to trial, and resulted in a judgment in favor of the plaintiff. From that judgment the defendant and intervener appealed. Upon the appeal, the judgment was reversed and the trial court was directed to enter a judgment in accordance with § 434, Remington's Code, which defines the kind of a judgment to be entered in a replevin action when the plaintiff does not prevail. The opinion gives no other or further direction.

After the remittitur was filed in the superior court, the defendant and intervener proposed findings, conclusions of law and a form of judgment. The plaintiff filed a petition setting out that, subsequent to the trial, and while the cause was pending in this court, a lien which had been placed on the boat by the intervener and the defendant had been foreclosed in an action in which the American Packing Company, Paul Luketa and Sam Luketa were named as defendants. They appeared and resisted the foreclosure of the lien. The suit resulted in a judgment of foreclosure, and the title passed to a third person as the result of such action. The trial judge, when the defendant and intervener's proposed findings, conclusions of law and judgment were presented, indicated that he would not

sign the same, but would make such findings, conclusions of law and enter such judgment as the record in the case would justify.

The trial judge also dismissed the petition presented by the American Packing Company, and declined to permit the fact to be shown that, subsequent to the trial of the action in the superior court, and while the same was pending here on appeal, the title to the boat had been lost through the foreclosure of a lien which had been created thereon by the defendant and intervener.

After the trial judge had indicated the manner in which he proposed to dispose of the case, the defendant and intervener made this application for a writ of mandamus to require him to sign the findings, conclusions of law and judgment proposed by them.

A writ of mandamus will not run to the superior court to compel it to decide a matter one way or the other, and judicial discretion cannot be controlled by such writ. This we think is what the relators here are asking us to do by this application. The trial court is not refusing to proceed to final determination of the action before it, but is proceeding in a way that the relators conceive as a violation of their rights. The remedy, if this be error, is not by mandamus. *In re Clerf*, 55 Wash. 465, 104 Pac. 622; *State ex rel. Woods v. Mackintosh*, 99 Wash. 553, 169 Pac. 990.

Likewise, if the refusal of the trial judge to hear the matter presented in the petition of the plaintiff, the American Packing Company, was error, it cannot be corrected by writ of mandamus. Upon this matter the court was exercising a judgment, and, if error was committed, it cannot be corrected in this proceeding. This is not a case where a cause has been appealed to this court and, on the disposition of the same here, a specific judgment has been directed. The direction

July 1919]

Opinion Per MAIN, J.

given in the opinion was only such direction as the law gives.

Some complaint is made upon this application that the court did not, when the cause was here and the judgment reversed, find the value of the boat and the damages for the taking and withholding. Upon this question, the trial court had made no findings, and the question was not discussed in the briefs, and it seemed best to remand the case to the superior court, in order that the trial judge, who heard the evidence, might first exercise his judgment in the matter. Had this court at that time indicated the findings, the party or parties feeling themselves aggrieved would doubtless have complained because they had not had an opportunity to be heard upon the matter.

Upon the record here, this court could not have taken into consideration any matter that might have happened subsequent to the entry of the judgment and pending the appeal which was proper to be considered in finally disposing of the case.

The writ will be denied.

MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15105. Department One. August 5, 1919.]

THE STATE OF WASHINGTON, *on the Relation of the City of Republic et al., Plaintiff*, v. E. G. HARVEY, *as Mayor of the City of Republic, Respondent*.¹

MUNICIPAL CORPORATIONS (485, 511)—CURRENT EXPENSE FUND—ERECTION OF CITY HALL. The cost of erecting a city hall does not come within and therefore cannot be paid out of the "current expense fund" created by Rem. Code, § 5140-3, for cities of the third class for the payment of current expenses.

Appeal from a judgment of the superior court for Ferry county, Neal, J., entered September 19, 1918, upon findings in favor of the plaintiffs, in an action to compel the mayor of a city to countersign a municipal warrant, tried to the court. Reversed.

Samuel Porter, for relators.

Charles P. Bennett, for respondent.

MAIN, J.—This is a mandamus action, brought by the relators in the superior court for the purpose of compelling the respondent, the mayor of Republic, to countersign a municipal warrant. A judgment was entered as prayed for by the relators, and the respondent appeals. To avoid confusion, the same designation will be given the parties as in the superior court.

Republic is a city of the third class. The respondent was the duly elected, qualified and acting mayor thereof. The relator the city of Republic was the owner of a lot located within the corporate limits of the city, upon which a city hall and fire station had been erected. In the month of August, 1917, this building was destroyed by fire. In September following, the city council of the city, in making their estimate required to meet the city current expenses for

¹Reported in 182 Pac. 931.

Aug. 1919]

Opinion Per MAIN, J.

the ensuing year, included therein the sum of \$4,000 for the construction and repair of public buildings, and the city council thereafter, in October, determined that the amount so estimated should be raised by taxes duly levied upon the property within the corporate limits of the city.

In the month of April, 1918, the city council decided to cause to be erected a city hall upon the lot owned by the city and occupied by the building which had previously been destroyed by fire. A contract for the construction of the building was entered into with the relator George I. Higgins.

Higgins entered upon performance of the contract, and on September 3d, 1918, the city council ordered and directed that a warrant be issued by the proper officers of the city, and delivered to him, for the sum of \$100, this warrant to be drawn upon the treasurer of the city and against the moneys in the current expense fund. At the time the warrant was authorized by the city council and the respondent refused to countersign it, there was in the current expense fund of the city more than sufficient funds to pay it.

The warrant was duly drawn by the city clerk and presented to the respondent, as mayor of the city, to be by him countersigned, which he refused to do. The city at this time was beyond its debt limit of one and one-half per centum, and no vote of the people had been taken authorizing a current indebtedness. If the respondent's refusal to countersign the warrant was rightful, the judgment of the superior court must be reversed.

Section 3 of ch. 186, Laws of 1915, p. 669, provides that:

"There shall be in each city of the third class a fund to be known as the 'Current Expense Fund.' Each such city shall levy for the year 1916 and for each

year thereafter a tax upon the property in such city for the payment of current expenses in an amount equal to the estimate by the city council of the current expenses for the ensuing year less the amount of revenues from all other sources payable into such current expense fund, the proceeds of which tax shall be paid into such current expense fund except as otherwise provided in this act. . . ." Rem. Code, § 5140-3.

It will be noted that this section of the statute provides for what is called a "current expense fund," and that there shall be levied for the purposes of such fund a tax upon the property in the city for the payment of "current expenses," the tax to equal the estimate of the city council of the current expenses for the ensuing year, less the amount of revenue from other sources payable into such current expense fund.

It was under this statute that the taxes were levied and the warrant in question was drawn upon the current expense fund. The statute does not undertake to define what may be included within the designation of current expenses. Unless the erection of a city hall and fire station can be held to be a current expense, the respondent was justified in his refusal to countersign the warrant.

In *Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 228, it was said that the building of a new school house did not come within any "authorized signification of current expense." In the *City of South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, it was held that the erection of a city hall was not in any sense an ordinary expense, but was an extraordinary one. In *State ex rel. Reed v. County of Marion*, 21 Kan. 308, it was held that the construction of permanent county buildings was not a current expense. Likewise, in *Babcock v. Goodrich*, 47 Cal. 488, the court was of the opinion that the erection of a county jail was not a current expense. With-

Aug. 1919]

Opinion Per MAIN, J.

out multiplying citations, it may be said that the rule stated in the cases cited is in accord with the general current of authority. It seems clear that current expenses would not include the erection of a city hall and fire station.

It is not claimed in this case that the city council was performing a function made mandatory by the constitution, or that the city hall and fire station was necessary to maintain the corporate existence of the city of Republic.

Since we have concluded that the erection of a city hall does not come within the designation of current expenses, it becomes unnecessary to consider other questions which were presented in the briefs.

The judgment of the superior court will be reversed, and the cause remanded with directions to dismiss the action.

MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15195. Department One. August 5, 1919.]

DORA C. BUNDY, *Respondent*, v. B. L. DICKINSON,
Appellant.¹

PARTIES (1)—CAPACITY TO SUE—MARRIAGE. A divorced woman had legal capacity to sue for breach of promise where the complaint alleged that she was unmarried at all times mentioned in the complaint.

ABATEMENT AND REVIVAL (10)—ANOTHER ACTION PENDING—DISMISSAL. Where a former action for breach of promise based on a prior promise was dismissed by stipulation although defendant withheld the stipulation from the files, its pendency cannot be pleaded in bar of a subsequent action based upon a promise made after the settlement of the first action.

RELEASE (7)—PLEADING. A release relied upon in an action for breach of promise must be affirmatively pleaded as a defense.

APPEAL (456)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY INSTRUCTIONS. In an action for breach of promise, error in receiving evidence of prior promises made while plaintiff was a married woman is cured by instructions that, to recover, plaintiff must show the promise relied upon after she obtained her divorce.

BREACH OF MARRIAGE PROMISE (7)—DAMAGES—AMOUNT. Thirty thousand dollars for breach of promise cannot be said to be excessive, where defendant admitted that he was worth \$90,000, especially where he made accusations against the chastity and good character of the plaintiff.

NEW TRIAL (35) — NEWLY DISCOVERED EVIDENCE — MATERIALITY — DILIGENCE. A new trial for newly discovered evidence is properly denied where it would not likely affect the result, and no effort had been made to secure the evidence although it was known to counsel that the witness might have knowledge of the facts.

SAME (49)—MISCONDUCT OF JURY. The denial of a new trial for misconduct of the jurors will not be disturbed where there were counter affidavits as to the credibility of certain affiants which were passed upon below.

SAME (32)—ABSENCE OF WITNESS—DILIGENCE. A party cannot complain of being deprived of a subpoenaed witness who departed before testifying, where there was no diligence to secure his attendance.

¹Reported in 182 Pac. 947.

Aug. 1919]

Opinion Per HOLCOMB, C. J.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered June 1, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for a breach of promise. Affirmed.

J. L. Wallace and J. W. Brooks, for appellant.

Geo. H. Rummens and Leon B. Kenworthy, for respondent.

HOLCOMB, C. J.—This is an action for damages for an alleged breach of promise of marriage. Defendant's demurrer being overruled, he answered, denying all material allegations, whereupon the cause was tried to the court and a jury, resulting in a verdict of \$30,000 in favor of plaintiff. Defendant unsuccessfully moved for a new trial, and from judgment entered on the verdict, he appeals.

It appears from the evidence that respondent, who obtained a divorce from Fred Bundy on September 30, 1916, was employed as a cook on the farm of appellant's son during the summer of 1915. The relations between appellant and respondent at once became very intimate, appellant frequently calling on respondent and automobiling with her. This intimacy was marred by respondent's commencing an action in July, 1917, against appellant for breach of promise of marriage. An amicable settlement was effected between the parties; respondent, on September 6, 1917, delivering to appellant a release directing dismissal of her case. At the same time, appellant voluntarily gave respondent, in his own handwriting and over his own signature, a testimonial as to her good character and his own high respect and regard for her. No order of dismissal was entered, appellant, having it in his keeping and control, never having filed the release; but neither did he answer or file any pleading. Thereupon, to all out-

ward appearances, the "entente cordiale" was restored. Another "era of good feeling" was ushered in, and the parties again enjoyed each other's society. Appellant asserts that the holy influence of mutual affection was never present during the alleged courtship. Respondent began to complain of neglect, but her complaints of inattention and failure to visit her were met with excuses of other engagements which precluded appellant's presence. The relations culminated in commencement, December 29, 1917, of the present action, based upon a promise of marriage made on or about, and frequently renewed after, September 6, 1917, and resulted as heretofore stated.

Appellant makes numerous assignments of error. His demurrer was properly overruled. The court had jurisdiction of the subject-matter and parties, there being no irregularity in the filing of the complaint and the appearance of appellant being general. Respondent, by reason of the fact, as alleged by her, that she was unmarried at all times mentioned in her complaint, had legal capacity to sue. As to the other subdivision of the demurrer, that another action was pending for the same cause, it is sufficient to say that there is nothing in the record to indicate such fact. The parties treated the prior action as dismissed, appellant obtaining a release directing dismissal of the action commenced in July, 1917, but he withheld it from the files, and the present action was instituted December 29, 1917, based upon a promise made in September, 1917. If he relied on this release, same should have been pleaded as an affirmative defense. 4 R. C. L. 165.

Appellant next complains that the trial judge erred in admitting certain evidence and rejecting other evidence; in giving improper instructions to the jury, and in refusing to give requested instructions.

Aug. 1919]

Opinion Per HOLCOMB, C. J.

Respondent was permitted to testify as to promises of marriage claimed to have been made while she was still a married woman, while her action is founded on an alleged promise subsequent to the time she obtained a divorce.

“The fact that appellant was under a legal disability to make a valid promise of marriage before her divorce, did not disqualify her from making an effective contract after the disability was removed. With mere ethical views as to the former agreement we have nothing to do. We are to determine the controversy here strictly upon the legal rights of the parties as they are made to appear since the time of that first agreement.” *Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926.

Appellant will not now be heard to complain. He chiefly endeavored to justify his conduct by showing immorality of respondent dating from the time she was employed by his son, and the error, if any, was cured by the court instructing the jury that, in order for respondent to recover, she must show that the promise relied upon in this suit was made subsequent to the commencement of the prior action and on or about or subsequent to September 6, 1917. The verdict of the jury is conclusive as to the contention of the respondent that, on or about September 6, 1917, she and appellant made a mutual promise of marriage and that appellant breached same. Both parties were in the presence of the jury, and it was their privilege to observe the demeanor of the parties and give such credit to their testimony as they deemed it deserved. Appellant testified concerning his relations with respondent from the summer of 1915 until immediately preceding commencement of this action. His explanation of constant association with respondent was a recital of a course of illicit conduct. He denied that love impelled them to seek the society of each other,

and instead of being gentlemanly mendacious or discreetly silent when a woman's reputation was at stake, he, with surprising effrontery, testified that they were incited solely by concupiscence and mutually agreed that marriage was not to be considered by them. Admitting frequent compunctive visits because of his misbehavior, nevertheless, he asserted, he continued his libidinous course of conduct with her. His assertions as to such conduct, at least prior to September 6, 1917, are belied by his written testimonial heretofore noticed.

Appellant also insists that the evidence in the case does not justify a verdict in favor of the respondent in the sum of \$30,000 and that it evidences on its face that the jury was influenced by passion and prejudice.

"The text writers and authorities agree with a unanimity of opinion rarely found in the books that, in cases of breach of promise, seduction, criminal conversation, and the like, evidence of wealth is admissible as tending to show the value of that which the plaintiff would have secured by a consummation or performance of defendant's promise." *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324.

See, also, 4 R. C. L. 155-157.

This being so, appellant admitting that he was worth \$90,000, and the jury being properly instructed as to this phase of the case, under all the circumstances and conditions shown in this action, including the nature of appellant's accusations and imputations against the chastity and good character of respondent, we cannot conclude that the verdict, although very substantial and probably larger than any of us would award as jurors, indicates passion and prejudice against appellant, or aught else than consideration of compensation such as the law sustains. *Kelly v. Navy Yard Route*, 77 Wash. 148, 137 Pac. 444.

Aug. 1919]

Opinion Per HOLCOMB, C. J.

We have read the entire record with much care, and not only have we been unable to find any erroneous prejudicial rulings on the admissibility of evidence, but it is our conclusion that the evidence admitted amply sustains the verdict of the jury. The requested instructions were properly rejected. Neither do we find any merit in the assignment that the court erred in giving other instructions. We are convinced that the trial judge carefully submitted to the jury all the issues raised by the pleadings of both parties, in accordance with the law.

A question is raised as to newly discovered evidence, upon the motion for new trial, of a witness named Millie Prater. In view of the nature of the evidence discovered and its controversion by respondent, and a showing as to the age and infirmity of the proposed witness, it cannot be presumed that the newly discovered evidence would affect the verdict. Moreover, the fact was known to one of counsel for appellant that the proposed witness might have knowledge of facts material to the defense prior to the commencement of the trial, and that she was then at a place in Montana not more than five hundred miles from the place of trial, and no effort was made to procure the attendance or deposition then or during the trial, or a showing for continuance on account of such witness; hence this cannot justly be considered newly discovered evidence. The trial court did not abuse its discretion in denying a new trial on that account.

A juror is sought to be impeached as to bias by affidavits as to statements tending to show prejudice on his part against appellant. Controverting affidavits denying such statements, and other counter affidavits as to the credibility of certain of affiants making affidavits for appellant, were filed and passed upon by the court. This matter is governed by our decision in

State v. Underwood, 35 Wash. 558, 77 Pac. 863, and *State v. Moretti*, 66 Wash. 537, 120 Pac. 102.

A witness named Tingley, subpoenaed by appellant, departed before testifying. It affirmatively appears that appellant did not use proper diligence to secure his apprehension, and cannot now complain of being deprived of his evidence.

Finding no error, we are compelled to affirm the judgment. It is so ordered.

TOLMAN, MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15271. Department Two. August 5, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
McPherson Brothers Company, Plaintiff, v. THE
 SUPERIOR COURT FOR CHELAN COUNTY,
*Defendant.*¹

HIGHWAYS (13)—ESTABLISHMENT—PETITION—SUFFICIENCY. Rem. Code, § 5623-4, providing for a petition for a county road by ten or more householders does not require that the petition state that they are householders, and where it was signed by ten or more residents and taxpayers and evidence was taken and acted upon, it will be presumed that the county commissioners were satisfied that they were householders.

EMINENT DOMAIN (120)—PROCEEDINGS—NECESSITY OF ANSWER. In condemnation proceedings for a county road, no answer is necessary, and it is therefore not error to sustain a demurrer to an answer or in refusing to allow a second answer.

EMINENT DOMAIN (158) — REVIEW ON CERTIORARI — RECORD. On certiorari to review proceedings to condemn a county road, the absence of evidence in the record does not show that no evidence was received, where the clerk's certificate merely stated that the record contains a true copy of the files, and the judgment recited that the order of necessity was made upon testimony received.

SAME (158). On certiorari to review an order of necessity for the condemnation of land for a county road, sufficiency of the facts cannot be reviewed where the evidence was not brought up.

¹Reported in 182 Pac. 962.

Aug. 1919]

Opinion Per BRIDGES, J.

Certiorari to review an order of the superior court for Chelan county, Grimshaw, J., entered February 6, 1919, adjudging a public use and necessity, in condemnation proceedings for a county road. Affirmed.

Peter McPherson, for relator.

Warren N. Wilson and *John W. Hanna*, for defendant.

BRIDGES, J.—Certain persons of Douglas county petitioned the commissioners of that county to establish a certain county road; the petition was referred to the county engineer, who reported favorably thereon and gave a particular description of the proposed road. Thereafter the commissioners caused notice to be given to the landowners of the time and place of hearing of the petition. The relator appeared at this hearing by its president and attorney and participated in the proceedings. In due course, the commissioners made an order finding the road to be necessary and establishing the same. It also found that the relator, over whose land a portion of the proposed road would be built, would be damaged thereby in a certain sum, which the commissioners caused to be tendered to the relator. This tender was rejected. Thereafter the commissioners made an order directing the prosecuting attorney of Douglas county to institute proper proceedings in the superior court for the purpose of acquiring the right of way for the road. Thereafter the prosecuting attorney did institute such proceedings by the usual petition and notice, and the relator was properly brought into court, where it both moved to require the petition to be made more definite and certain and demurred thereto upon certain statutory grounds. The motion was denied and the demurrer was overruled by the superior court of Chelan county,

to which court the cause had been transferred upon application for change of venue. The relator then filed an answer which contained certain alleged affirmative defenses. The county demurred to these affirmative defenses, which demurrer the court sustained. Thereafter, the relator filed an amended answer which, in substance, was the same as the original answer, and the demurrer of the county to the affirmative defenses of the amended answer was sustained. The relator then asked permission of the court to file a second amended answer which was substantially the same as the first amended answer. The court refused to permit the filing of this second amended answer. Thereafter the court made an order adjudging that the contemplated use of the real estate sought to be condemned was a public use, and that it was necessary that said real estate be condemned for the purpose of laying out the county road, which order further directed that the cause be submitted to a jury on the question of the amount of damages to be awarded. Thereafter the relator sued out this writ of certiorari, and it now contends that the original petition filed with the commissioners was insufficient, and that the court erred in overruling its demurrer to the petition in condemnation, and in sustaining the county's demurrer to both the original and first amended answer, and in refusing to allow relator to file its second amended answer. It also claims that the court erred in making the preliminary order of necessity without the taking of testimony.

There may be a question as to whether, in this proceeding, this court has a right to review the sufficiency of the road petition filed with the county commissioners, or to review any portion of the proceedings before that body other than jurisdictional questions. Inasmuch, however, as this question has not been briefed,

and we intend to uphold the sufficiency of the petition, we will pass upon those questions without specifically deciding our authority so to do.

I. The statute with reference to the laying out of county roads provides that the proceedings may be initiated by ten or more householders of the county, residing in the vicinity of the proposed road, filing with the county commissioners a petition for the establishment of the road. Rem. Code, § 5623-4. The petition in this case was signed by more than ten persons and recites that the signers "are residents and taxpayers of the county of Douglas and in the vicinity herein to be benefited." Relator's objection to this petition is that it is not signed by householders, as provided by the statute. It will be observed, however, that the statute does not require that the petition state that the signers are householders; it is sufficient if the county commissioners be satisfied that the signers are householders. Generally speaking, a resident and taxpayer is a householder, but probably not necessarily so. The order of the commissioners establishing the road shows upon its face that testimony was taken, and inasmuch as the commissioners proceeded to act upon the petition and establish the road, we must presume that they were satisfied that the petition had been signed by ten or more householders as provided by statute. At least, we must so presume until we find something in the record to show to the contrary. There is nothing to be found in the record showing that any of these petitioners were not householders. We conclude, therefore, that the petition is sufficient.

II. The relator complains of the court's order sustaining the demurrer to the affirmative defenses in each its original and first amended answer, and also complains that the court refused to permit it to file a second amended answer. These matters were entirely

within the discretion of the court. This court has held in a large number of cases that the statute with reference to cases of this character does not contemplate any answer upon the part of the landowner who is made a party to the action. *Seattle & M. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720; *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669; *In the Matter of Pike Street*, 42 Wash. 551, 85 Pac. 45; *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903; *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091. The landowner may, without any pleading, make any defense to such actions he sees fit. Since, therefore, no answer is necessary, there cannot be any error in sustaining the demurrer to the answers, or in refusing to allow the second amended answer to be filed.

III. The next contention, as we understand it, is that the trial court made its adjudication of necessity without the taking of testimony. The only thing in the record to indicate that this order was made without the taking of testimony is the absence from the record before us of any testimony. However, the fact that there is no testimony in the record would not conclusively show that no testimony was taken. The certificate made by the clerk of the court and attached to the record before us states that the record contains a true and correct copy of the "entire files" in the above entitled cause. It does not pretend to certify that the record contains all of the proceedings had in the case. Furthermore, the order of necessity made by the court shows that all the parties were present and that testimony was introduced by the petitioners, and we must, therefore, assume that the order of necessity was made upon testimony received.

Aug. 1919]

Statement of Case.

The relator also complains that the facts do not justify the court in making the order of necessity. Inasmuch as the facts are not before us, we must refuse to pass upon this point. We do not see any error in the record.

The order under review is affirmed. The stay of proceedings pending this hearing, heretofore granted by this court, is vacated.

HOLCOMB, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 15308. Department Two. August 5, 1919.]

JAMES PETERSEN *et al.*, *Appellants*, v. PACIFIC AMERICAN FISHERIES, *Respondent*.¹

PRINCIPAL AND AGENT (34)—AUTHORITY OF AGENT—SALES—EVIDENCE—SUFFICIENCY. Where the lease of a box factory required the lessee to finish and market certain stock on hand belonging to the lessor, receiving therefor actual cost and ten per cent added together with reasonable commissions, the lessee was clothed with apparent authority to sell the stock and receive payment for the same.

SAME (35, 42)—COLLECTION OF DEBTS—POWERS OF AGENT—REVOCATION—EVIDENCE—SUFFICIENCY. In such case, the fact that one of the lessors was referred to for an inventory and assisted in negotiating and consummating the sale did not revoke the lessee's authority to make the sale and collection, especially where the buyer had reason to suppose that such lessor was acting only as agent for the owner and not as owner.

SAME (38)—APPARENT AUTHORITY. As between one of two innocent parties, the loss must always fall upon the principal who has clothed an agent with apparent authority and enabled him to obtain an advantage over an innocent purchaser.

APPEAL (135)—OBJECTIONS—JUDGMENT. The failure to include interest in a judgment cannot be raised for the first time in the supreme court.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 12,

¹Reported in 183 Pac. 79.

1918, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Bixby & Nightingale, for appellants.

Kerr & McCord, for respondent.

BRIDGES, J.—The appellants sued to recover \$1,065 as the purchase price of certain box shooks, and \$75 as the purchase price of a certain shingle machine. The case was tried by the court without a jury. It gave judgment to the plaintiffs for \$75, being the sale price of the machine, but refused judgment on account of the box shooks.

The facts are substantially as follows: Each of the parties hereto was the owner of a manufacturing plant at Bellingham. In May, 1916, the appellants and one Wood entered into a lease contract whereby the appellants leased their factory to Wood. This lease, among other things, contained the following clauses:

“Understood that one of the conditions for the execution of this lease is that the lessees, immediately upon taking possession of the aforesaid plant, advise with lessor as to how the said stock and material on hand should be completed and finished to the best advantage, in order to obtain available markets therefor, and that lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand so that the same can be marketed to the best advantage, and the lessees will be paid therefor the actual cost of finishing the said material and labor, plus ten per cent on the same. Lessees further agree to immediately market said stock upon its being finished and completed to the best advantage and charge therefor a reasonable commission, and it is understood that said stock and material remain in the warehouse of said plant, where the same is now situate, until lessor determines to sell the same, without the paying of any rental or compensation for the use of said warehouse during said time.”

Aug. 1919]

Opinion Per BRIDGES, J.

Wood thereafter transacted business under the name of W. W. Wood Manufacturing Company. He at once entered into possession of the leased property, including all box shooks, lumber, etc., on the premises, and he remained in possession throughout the period of this controversy. Shortly prior to August, 1916, F. O. Biery, one of respondent's foremen, visited the Wood plant with the view of purchasing its hand shingle machine. While on the premises he saw a miscellaneous lot of box shooks, which he thought his employer might want to purchase. He entered into negotiations with Wood concerning the purchase of the machine and such of the box shooks as would suit the purposes of respondent. Wood, however, did not have any inventory of the box shooks, and referred Biery to Thomas R. Waters for this information. Mr. Waters was an attorney at law at Bellingham and part owner of the leased property. Biery had several conferences with Waters looking towards the purchase of certain of the box shooks; they did not, however, at that time agree upon a sale. Later, Wood again took up the question of the sale with Biery and terms were substantially agreed upon. Biery, however, did not have any authority to consummate the sale and requested Waters to meet H. B. Drisko, respondent's assistant manager, at the office of respondent, for the purpose of closing the deal. Upon this request, Mr. Waters met Mr. Drisko at respondent's office, where the deal was closed. The shingle machine was sold for \$75, and such of the box shooks as the respondent might select out of a miscellaneous lot were sold for \$3 per thousand sets.

Waters testified that, at this conference, he requested the respondent to send to him or to one James McDonald the check for the purchase price. Drisko and

Biery, who were both present at this conference, denied that anything was said about the check or to whom payment should be made. The following day Waters went East, and did not return to Bellingham until about the first of November, 1916. Wood took charge of the sorting and tallying and delivering of the shooks to respondent; Biery assisting in keeping the tally. From the time of the sale on till early in November, neither Wood nor any of the appellants had anything to do with the shooks. They had no further conferences with respondent and did not send respondent any statement of the shooks sold or make any demand for payment. Sometime in October and before Waters returned from the East, the Wood Manufacturing Company sent to the respondent a bill for the purchase price of the machine and the box shooks. This bill ran against respondent and in favor of the Wood Company. It was on the billhead of the Wood Manufacturing Company. A few days after receiving the statement, the respondent made its check for the amount of the bill to the Wood Manufacturing Company, and the latter, after having received the check, cashed it and has never paid the appellants any of the proceeds thereof. Upon Waters' return from the East, he learned that his company had not received its pay, and made inquiry of the respondent and was told that payment had been made to the Wood Manufacturing Company. One O. W. Crandall, who was in the employ of the Wood Manufacturing Company and acted in the capacity of bookkeeper and manager, testified that Waters told him to send a bill to respondent and collect the money. Waters denied this.

The court's findings give the facts substantially as above, but, in addition, find that, by the terms of the lease contract, Wood was authorized and empowered

Aug. 1919]

Opinion Per BRIDGES, J.

to sell the box shooks and to collect the purchase price thereof, but that he did not have any authority to sell the machine or to collect therefor; that, when the deal was closed at the office of the respondent, Waters requested the respondent to send a check in payment either to him or McDonald, but nothing was said as to whom the check should be drawn; that Biery, who represented the respondent, did not know that Waters had, or claimed to have, any ownership in the box shooks, but thought he was representing the owner of the shooks or the Wood Manufacturing Company, as agent or attorney. The court further found that the power given by the lease to Wood to sell the box shooks had never been revoked.

The trial court based its conclusions and judgment almost entirely on the lease contract. The appellant urges a new trial, chiefly on two grounds; first, that the lease contract does not authorize Wood to sell the box shooks or to collect the price thereof; and second, that if the lease does authorize Wood to sell the shooks and collect therefor, that power was revoked before the consummation of the sale in controversy here. The statement of a few fundamental principles will assist in arriving at a correct decision.

“Where the principal has clothed the agent with the *indicia* of authority to receive payment, as by entrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of sale. But when the agent has not the possession of the goods, and no other *indicia* of authority, and is only authorized to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive payment.” 1 Am. & Eng. Ency. Law (2d ed.), p. 1014.

Payment to an authorized agent will operate as a discharge of the indebtedness, though the agent mis-

appropriate the payment. 22 Am. & Eng. Ency. Law (2d ed.), p. 518.

A principal is not only bound by the acts of his agent, general or special, within the authority which he has given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341.

The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. 31 Cyc. 1333.

One clause of the lease contract provided that Wood should advise with the appellants as to how to obtain available markets for the box shooks and "that lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand so that the same can be marketed to the best advantage . . . Lessees further agree to immediately market said stock upon its being finished and completed to the best advantage and charge therefor a reasonable commission, and it is understood that said stock and material shall remain in the warehouse of said plant, where the same is now situated, until the lessor determines to sell the same, without the payment of any rental or compensation for the use of the warehouse during said time." The appellants contend that this provision of the lease only authorized Wood to find a market and does not authorize him to sell the shooks. We cannot so hold. The contract shows clearly that

Aug. 1919]

Opinion Per BRIDGES, J.

the intention was that Wood should not only have the authority, but it would be his duty actually to sell these box shooks. The instrument even goes so far as to provide that the lessees shall be entitled to a reasonable commission for this service. It is true that the last clause above quoted provides that the box shooks shall be permitted to remain in the warehouse "until the lessor determines to sell the same," but this was not intended to reserve the right of sale exclusively in the appellants, but was put in the contract merely to guard against any charge which the lessees might make the appellants for warehouse rent.

The appellants further contend, however, that the implied power to collect the purchase price is always dependent upon the exercise by the agent of his power to sell, and that, where the principal makes the sale, the presumption of law is that he alone had authority to make the collection; and that, since Waters actually made the sale, the agent had no authority to make the collection. As principles of law, these contentions may be accepted as correct, but they are inapplicable here because the testimony does not show that Waters, as the owner of the property, made the sale. The most that he did was to assist in making the sale, and even in this the respondent supposed, and had reason to suppose, that Waters was acting as the agent or attorney for the owner, and not as owner. The appellant contends that the trial court's finding was to the effect that Waters made the sale, but we do not so construe it. The finding was merely to the effect that Waters finally closed or confirmed the sale. We have very carefully read and considered the testimony and it is perfectly plain to us that the terms of the sale were made between Wood and Biery, the foreman of the respondent, and that Waters did nothing more than to

assist in the making of the sale. It cannot be said that what Waters did had the effect of revoking the powers given in the lease to Wood.

As between two innocent persons, one of whom must suffer, the loss should always fall on the principal who has clothed the agent with apparent authority and thus enabled him to obtain the advantage of the person with whom he deals, rather than on the purchaser. *Galbraith v. Weber, supra*. Considering all the testimony, we cannot avoid the conclusion that not only did the lease itself give Wood the power to sell and collect, but that the conduct and acts of the appellants, through Waters, were such as to hold out to the respondent that Wood was authorized to sell as well as to collect. Under all the circumstances as shown by the record, it seems to us that any person placed in the position of the respondent, and having the information which it had, would, without hesitancy and with perfect justification, have made the payment to Wood, as the respondent did in this case.

It will not serve any good purpose for us to particularly refer to the testimony upon which our conclusion is based.

The appellants contend that the judgment of the trial court for \$75 should have carried interest from the date it should have been paid to the date of judgment. If it should be conceded that the court would have had authority to have given interest, yet we find that the appellants are in no position now to raise that question. The court's conclusion of law number one was to the effect that the appellants were entitled to judgment for \$75, and for its costs and disbursements. The conclusion did not provide for any interest. The appellants did not take any exception to the conclusion, nor do we find anything in the record which would tend to

Aug. 1919]

Opinion Per MAIN, J.

indicate that the appellants at any time called the court's attention to this question of interest. Appellants seem to have raised the question for the first time in this court.

Judgment affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and MOUNT, JJ.,
concur.

[No. 15326. Department One. August 5, 1919.]

AUGUST FREYMAN, *Appellant*, v. HARRY L. DAY *et al.*,
Respondents.¹

EVIDENCE (27)—PRESUMPTIONS—LAWS OF OTHER STATES. In the absence of pleading and proof, it will be presumed that the laws of a sister state are the same as the laws of this state.

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—REMEDIES. An action cannot be maintained by an employee for injuries sustained in another state while working in an extra hazardous employment (mining) in the absence of allegation or proof as to the laws of such state, which presumptively are the same as our own, withdrawing relief for such injuries from private controversy.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered June 19, 1918, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Eugene A. Childe, for appellant.

John H. Wourms and *Plummer & Lavin*, for respondents.

MAIN, J.—The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor

¹Reported in 182 Pac. 940.

of the plaintiff. The defendants made a motion for judgment notwithstanding the verdict, which was sustained, and a judgment was entered dismissing the action. From this judgment, the plaintiff appeals.

The respondents are copartners operating a mine near the town of Burke, in the state of Idaho. On the 3d day of July, 1917, the appellant, while employed in the mine, sustained the injuries on account of which he instituted this action. The action was brought in the superior court of Spokane county, in this state. There was no pleading or proof as to what the laws of Idaho were relative to accidents of this character. In the absence of such pleading and proof, it will be presumed that the laws of Idaho are the same as the laws of this state.

In this state there is a law known as the workmen's compensation act (Rem. Code, § 6604-1 *et seq.*), wherein it is provided that relief to workmen for injuries occurring in extra hazardous work are withdrawn from private controversy. In section 2 (Id., § 6604-2) of the act, work in mines is specified as extra hazardous. In section 8 (Id., § 6604-8) of the act, as originally passed, there was preserved a right of action against an employer who had defaulted in any payment that he was required to make under the act to the accident fund. In 1917 (Laws of 1917, ch. 120, p. 487, § 5), the section of the original act giving a right of action against a defaulting employer was amended. In the amended section, the right of action against a defaulting employer by the injured employee was not preserved. Other means were provided by which compulsory payment could be made to the accident fund. This amendment was in full force and effect at the time the appellant's accident occurred.

It thus appears that, had the appellant sustained the injuries for which he complains in this state, he

Aug. 1919]

Syllabus.

would have no right to wage a law action for the recovery of damages, but would be required to take compensation provided for in the workmen's compensation act. It follows, therefore, that, since there was no pleading or proof as to the laws of Idaho, in the absence of which the law of that state will be presumed to be the same as this, the appellant could not maintain this action for the recovery of damages. It must be remembered that the accident in this case did not happen in interstate commerce, and consequently would not come within the provisions of the statute covering that subject-matter.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15359. Department Two. August 5, 1919.]

JONES-SCOTT COMPANY, *Appellant*, v. ELLENSBURG
MILLING COMPANY, *Respondent*.¹

FRAUDS, STATUTE OF (37) — SALE OF GOODS — MEMORANDUM—SUFFICIENCY. A written contract satisfying the statute of frauds is shown by correspondence where the seller of wheat wrote confirming a sale of 10,000 bushels of blue stem wheat at \$2.44 f. o. b. Eureka Flat points, the buyer to send check of \$1,000 as margin, and the buyer, while at first failing to directly acknowledge the contract, wrote about sixty days later that he would take the wheat "bought from you last August if you will give me time," and fixing date for first shipment subject to sight draft.

SALES (129)—ACTIONS FOR PRICE—COMPLAINT—PERFORMANCE OF CONTRACT. A performance of a contract for the sale of wheat and the buyer's refusal to accept are sufficiently shown by a complaint alleging that the seller bought the grain for the purpose of supplying the buyer and held it subject to his order until he repudiated and disavowed the contract and refused to receive it.

SALES (35)—TIME FOR DELIVERY. Where a contract for the sale of wheat does not state the time for delivery, delivery may be made within a reasonable time.

¹Reported in 183 Pac. 113.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered November 18, 1918, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Gose & Crowe and *Hovey & Hale*, for appellant.

Austin Mires and *Carroll B. Graves*, for respondent.

MOUNT, J.—This action was brought to recover damages because defendant failed and refused to carry out a contract for the purchase of ten thousand (10,000) bushels of wheat. When the original complaint was filed, the defendant demanded, and was furnished with, a bill of particulars setting out the contract relied upon. This bill of particulars consisted of four letters written between the parties, as follows:

“August 13, 1917.

“Ellensburg Milling Company,

“Ellensburg, Washington. Attention Mr. Helm.

“Gentlemen:

“We confirm sale of 10,000 bushels of Bluestem on the 11th at \$2.44, f. o. b. cars Eureka Flat points, understanding that we are to carry you on this wheat at 7 per cent and you to send us your check of \$1,000 as margin and as per our phone conversation with you Saturday morning you were to have sent us the check that day. As the mail did not bring it in we suppose you overlooked this. Kindly mail us your check and oblige,

Yours very truly,

“Jones-Scott Co.,

“(Signed) By H. B. Kershaw.”

“August 27, 1917.

“Ellensburg Milling Company,

“Ellensburg, Washington Attention Mr. Helm.

“Gentlemen:

“When you were here little over a week ago, you advised that you would remit us \$1,000 on account in three days or by Wednesday of last week. We have

Aug. 1919]

Opinion Per MOUNT, J.

put out something over \$24,000 for your account and we think it is up to you to mail us this check.

"Yours very truly,

"Jones-Scott Co.,

"(Signed) By H. B. Kershaw."

"Jones-Scott Co.,

August 28, 1917.

"Walla Walla, Wash.

"Gentlemen: Regarding the \$1,000, there was a note of \$3,000 due which we cleaned up, and we cannot pay the \$1,000 at this time. We have not made arrangements for handling the new crop yet, as our banker is out of town. We will pay this, however, at the earliest possible moment. Yours very truly,

"Ellensburg Milling Co.

"(Signed) By Helm."

"Jones-Scott Co.,

October 13, 1917.

"Walla Walla, Wash.

"Gentlemen: If you will give me time I will take the wheat bought from you in August. You can ship one car about November 1st and draw sight draft. Will take balance as fast as I can.

"Ellensburg Milling Co.

"(Signed) By Helm."

After this bill of particulars was filed, the trial court sustained a general demurrer to the complaint. The plaintiff thereupon filed an amended complaint substantially the same as the original. The trial court sustained a general demurrer to this amended complaint; plaintiff elected to stand upon the allegations thereof, and the action was dismissed. Plaintiff has appealed.

It is argued by the respondent that the writings set forth above, relied upon by the appellant, do not constitute an enforceable agreement under the statute of frauds, for the reason that no memorandum was signed by the respondent containing the terms of the alleged contract, nor were the terms contained in the writings signed by the appellant ever accepted or agreed to in

writing by the respondent. There can be no doubt of the rule that a written contract may be gathered from letters passing between the parties. *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031.

As was said in *Ryan v. United States*, 136 U. S. 68, at page 83:

"The principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract."

Referring now to these letters: The first one, dated August 13, 1917, from Jones-Scott Company to Ellensburg Milling Company, said:

"We confirm sale of 10,000 bushels of Blue stem on the 11th at \$2.44, f. o. b. cars Eureka Flat points, understanding that we are to carry you on this wheat at 7 per cent and you to send us your check of \$1,000 as margin"

Two weeks later, on August 27, the Jones-Scott Company again wrote to the Ellensburg Milling Company, saying:

"When you were here little over a week ago you advised that you would remit us \$1,000 on account in three days or by Wednesday of last week. We have put out something over \$24,000 for your account and we think it is up to you to mail us this check."

Upon the next day, the Ellensburg Milling Company answered that letter, saying:

"Regarding the \$1,000, there was a note of \$3,000 due which we cleaned up, and we cannot pay the \$1,000 at this time. We have not made arrangements for handling the new crop yet, as our banker is out of town. We will pay this, however, at the earliest possible moment."

Aug. 1919]

Opinion Per MOUNT, J.

Up to this point there was apparently no acknowledgment of the alleged contract by the Ellensburg Milling Company, though there is a statement evidently referring to the letter of the Jones-Scott Company, written the day before, in which they agree to pay the \$1,000 therein mentioned at the earliest possible moment. Two months thereafter, the Ellensburg Milling Company wrote to the Jones-Scott Company, saying:

“If you will give me time I will take the wheat bought from you in August. You can ship one car about November 1st and draw sight draft. Will take balance as fast as I can.”

We think there can be no doubt that this letter refers to the contract mentioned by the Jones-Scott Company on August 13. If this letter had been dated the next day, or within a few days after August 13, there could be no escape from the conclusion that it referred to that letter and was in answer to it; for it says: “I will take the wheat bought from you in August.” The respondent, in reference to this letter, says that it makes no reference to the memorandum of appellant of August 13 and accepts no terms proposed by the appellant, but makes a counter proposition which appellant seems to have turned down, as it is not again referred to. The only counter proposition which we gather from this letter is contained in the words, “if you will give me time.” By the letter of August the 13th from the Jones-Scott Company to the Ellensburg Milling Company, time was provided for, and we think this letter of October the 13th makes no change in the terms of the contract and expressly accepts the terms referred to in the letter of August 13. We are of the opinion, therefore, that these two letters taken together constituted a complete contract between these parties sufficient to take the contract without the statute of frauds. The intervening letters of August 27 and 28,

while not directly acknowledging the contract, did not accept it. The one dated the 28th in substance stated that respondent was not ready at that time to pay the thousand dollars or to receive the grain. The letter of October 13 expressly acknowledges the contract—"If you will give me time . . ." These two letters clearly made a contract between the parties with all the necessary terms and conditions.

Respondent further argues that the complaint does not show a performance of the contract or tender of performance. Upon this question the amended complaint alleges that appellant bought the ten thousand bushels of blue stem wheat at Eureka Flat points, in Walla Walla county, for the purpose of supplying respondent therewith upon its demand therefor; that appellant held the grain subject to respondent's demand therefor at that place until respondent, on the 7th day of January, 1918, repudiated and disavowed the contract and refused further to be bound thereby or to receive the wheat. This allegation was clearly sufficient to show that the appellant purchased and held the wheat for the respondent and that respondent refused to accept it. It is true the contract set out in these letters does not state the time at which the wheat should be delivered, but where no time is stated in the contract delivery may be made within a reasonable time. *Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007.

We are satisfied that the complaint stated a cause of action and that the trial court was in error in sustaining the demurrer.

The judgment appealed from is therefore reversed, and the cause remanded for further proceedings.

HOLCOMB, C. J., PARKER, FULLERTON, and BRIDGES, JJ., concur.

Aug. 1919]

Opinion Per MOUNT, J.

[No. 15369. Department Two. August 5, 1919.]

J. H. GILLULY, *Trustee, Respondent*, v. EDWARD K.
HAWKINS, *Appellant*.¹

ARMY AND NAVY—RELIEF ACT—EVICTION—DISCRETION—FEDERAL STATUTE. Under the military and naval relief act providing that there shall be no eviction of defendants from a dwelling where the monthly rental does not exceed \$50, except on leave of court which in its discretion may stay proceedings for three months, the court exercises its discretion under the act where it suspended the writ of restitution for more than three months and then upon the trial decided that the writ should issue.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 30, 1918, upon findings in favor of the plaintiff, in an action in unlawful detainer, tried to the court. Affirmed.

Jay C. Allen and Edward K. Hawkins, in pro per.,
for appellant.

Elias A. Wright and Sam A. Wright, for respondent.

MOUNT, J.—This is an action in unlawful detainer, based upon the failure of the defendant to vacate certain premises after twenty days' notice terminating his tenancy.

Plaintiff, on the 23d day of August, 1918, filed his complaint, alleging that he was the owner of the property; that the defendant was in possession as a tenant, the tenancy being one from month to month with a stipulated monthly rental; that the monthly tenancy terminated on the 21st day of each and every calendar month; that, on the first day of August, 1918, plaintiff caused to be served upon the defendant a notice terminating his tenancy on the 21st day of August and requiring the defendant to deliver possession of the

¹Reported in 182 Pac. 958.

premises to the plaintiff; and that the defendant failed and refused to comply with the notice and unlawfully withholds possession of the premises from the plaintiff. Upon the filing of this complaint, a writ of restitution was issued, and thereafter, on August 31st, the defendant appeared in the action and filed a motion to vacate and set aside the writ of restitution for the reason that the defendant was dependent upon a son who was a soldier in the military service of the United States, and that the agreed rent did not exceed fifty dollars (\$50) per month. This motion was based upon an affidavit stating, in substance, that the defendant was the father of a soldier engaged in the military service of the United States; that he was wholly dependent upon the support he received from that soldier; that he was occupying the premises as a residence at a rental of eight dollars (\$8) per month; and upon the further ground that the tenancy was an oral tenancy for the period of one year and not from month to month. This motion came on to be heard, and the court suspended the writ of restitution until the final hearing of the case. Thereafter an answer was filed which set up substantially the facts stated in the affidavit, and a reply was filed to the answer. The case came on for trial on December 17, 1918. At the trial, the court found that the tenancy was one from month to month; that a notice to quit was properly served on the first day of August, 1918, requiring the defendant to deliver possession to the plaintiff; and entered a judgment as prayed for in the complaint. The defendant has appealed from that judgment.

He relies upon the provisions of the act of Congress entitled:

“An act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war,”

Aug. 1919]

Opinion Per MOUNT, J.

approved March 8, 1918, subd. 1, of § 302, of which provides:

“That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.”

Subdivision 2 of this section provides:

“On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this act, or it may make such other order as may be just.” Federal Statutes Annotated (2d ed.), Supplement 1918, p. 816.

If we may concede that the appellant is a dependent of a person in the military service, as provided in that act, it is apparent that the act leaves it to the discretion of the court to grant the relief prayed for in the complaint. In this case the trial court exercised that discretion and suspended the writ of restitution for a period of more than three months, and then, upon the trial of the case, concluded that the writ should issue. We think it is plain from the terms of the act itself that the court was justified in so doing.

It is also argued that the tenancy here created was a tenancy for one year. There was a conflict of the evidence upon this point. The court found that the tenancy was from month to month only. There is abundant evidence in the record to justify this finding. In fact, we are convinced that any other finding would have been against the weight of the evidence.

We find no error, and the judgment is therefore affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and BRIDGES, JJ., concur.

[No. 15213. Department Two. August 6, 1919.]

GEORGE B. SIMPSON, *Trustee in Bankruptcy etc., Appellant*, v. SISTERS OF CHARITY OF THE HOUSE OF PROVIDENCE, *Respondent*.¹

MECHANICS' LIENS—SATISFACTION OF CLAIMS OF OWNER—ESTABLISHMENT OF LIEN—NECESSITY FOR ADJUDICATION. Where the building contract provides that the owner may retain an amount sufficient to indemnify him against any lien or claim for which the owner of the premises might be chargeable, it is not necessary that the lien claims be actually adjudicated, but a compromise and payment of claims pending in litigation entitles the owner to deduct the amounts paid on claims which were shown, by stipulation, to be valid liens against the building for material and labor furnished to the contractor.

SAME. Rem. Code, § 1139, providing that, in case of judgment upon a lien, the owner shall be entitled to deduct the amount from the sum due the contractor, is not a limitation upon the right of the owner to protect his property, and does not require judgment upon a lien to entitle the owner to indemnity.

TRIAL (32)—REOPENING CASE FOR FURTHER EVIDENCE—DISCRETION. It is discretionary for the trial court, after announcement of a tentative decision, to reopen the case for further evidence, where no formal judgment had been entered.

Appeal from a judgment of the superior court for Clarke county, McCroskey, J., entered January 11, 1918, upon findings in favor of the defendant, in an action by a trustee in bankruptcy to recover a balance due upon a building contract, tried to the court. Affirmed.

George B. Simpson, for appellant.

Miller & Wilkinson, for respondent.

¹Reported in 182 Pac. 937.

Aug. 1919]

Opinion Per PARKER, J.

PARKER, J.—The plaintiff Simpson, as trustee in bankruptcy for Moore & Hardin, seeks recovery of a balance of \$14,346.50, which he alleges to be due upon their contract for the construction of a hospital building for the defendant Sisters. The defense made is that the Sisters were compelled to pay, and did pay, in defending and satisfying valid lien claims against the building for material and labor, sums largely in excess of the balance of \$14,346.50 which would otherwise have been due to Moore & Hardin upon their building contract, which claims were for materials and labor furnished Moore & Hardin in the construction of the building, and thereby became liens encumbering it in an amount largely in excess of such balance due upon the building contract. Trial in the superior court sitting without a jury resulted in findings and judgment denying recovery, from which the plaintiff has appealed to this court.

In the year 1910, Moore & Hardin entered into a contract with the Sisters by which they agreed to furnish material for and construct a hospital building in the city of Vancouver, for an agreed compensation of \$88,000. They proceeded with the construction of the building until its completion on or about March 17, 1911, when they were adjudged bankrupts by the Federal court, and appellant was appointed trustee to wind up their affairs. There had been paid to Moore & Hardin by the Sisters upon the building contract from time to time, sums aggregating \$73,653.50. It is the difference between that amount so paid and the total contract price which is sought to be recovered in this action. Among other stipulations in the building contract, we find the following:

“If at any time there shall be evidence of any lien or claim for which if established the owner of the said premises might become liable and which is chargeable

to the contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default."

Lien claims against the building were asserted by those furnishing material and labor to Moore & Hardin in its construction, aggregating over \$33,000, all of which remained unsatisfied at the time of the completion of the building and the adjudging of Moore & Hardin to be bankrupt. Actions seeking the foreclosure of these lien claims were commenced in the superior court for Clarke county by the several claimants, the Sisters and Moore & Hardin being made defendants therein. These actions were consolidated for the purpose of trial, and the trial proceeded to the point where the evidence showed, as counsel conceived, in all but two of them, that the claims of lien were good as against the building, at least in an aggregate amount largely in excess of the \$14,346.50 remaining unpaid upon the building contract. Counsel for the respective parties in those actions then agreed upon a compromise settlement of the claims, save as to two of them, resulting in payment by the Sisters of the aggregate sum of \$14,329 in full settlement of the claims so compromised, which claims, in the aggregate, amounted to approximately \$30,000. The trial of those actions had proceeded for several days up to this point, and manifestly counsel for the Sisters were moved to make the compromise settlement in order to avoid what they conceived to be a certainty that the rendering of final judgments therein upon the merits would result in establishing liens against the building largely in excess

Aug. 1919]

Opinion Per PARKER, J.

of the unpaid balance upon the building contract. At the time of the compromise settlement, the Sisters had incurred expense in defending against these claims an amount far in excess of the \$17.50, the difference between the amount paid to the lien claimants and the amount of the unpaid balance upon the building contract. There was a stipulation as to some of the facts, made and signed by counsel for the respective parties, which was used upon the trial, in which we find, among other things, the following:

“That, during the construction of the said building by the said Moore & Hardin under the contract mentioned, said Moore & Hardin employed numerous employees and sublet numerous contracts for the construction of different parts of said building, and purchased materials from divers and sundry persons which went into and became a part of the building, and the said Moore & Hardin became indebted to such employees, subcontractors and materialmen for such labor and material furnished in various amounts, and failed and neglected to pay for all of said material, subcontracts and labor growing out of the construction of said building, and numerous liens were filed on the property of the defendant and on the building constructed by said Moore & Hardin and known as the St. Joseph's Hospital, and on the land on which the building is situated, and when said building was turned over to defendant the lien claims amounted to many thousands of dollars in excess of the balance due the said Moore & Hardin under the said contract, and at said time said Moore & Hardin were bankrupts and insolvent.”

This seems to us to be an admission that the valid lien claims against the building, for which the compromise settlement was made, in the aggregate, amounted to more than the balance due upon the building contract.

The principal contention here made by counsel for appellant seems to be that the payments made in sat-

isfaction of the lien claims do not entitle the Sisters to the benefit of such payments as if made to Moore & Hardin or to appellant as their trustee in bankruptcy, because there was no formal adjudication in the superior court of the validity of the claims so satisfied. It seems to us that the real question to be determined by the trial court in this case was not whether or not the lien claims had been formally adjudicated to be valid in an amount aggregating the unpaid balance upon the building contract, but whether or not the lien claims so compromised were in fact valid lien claims against the building in an amount aggregating at least the unpaid balance upon the building contract. It is true that a formal judgment of the superior court so determining would be evidence of the validity of such liens, but we do not understand the law to be that it was necessary that the validity of such liens was required to be proven in this action by a formal prior adjudication thereof in order to give the Sisters the right to satisfy such liens and receive credit upon the building contract price for the amount paid in satisfaction of such liens. In the satisfying of these lien claims it is apparent that the Sisters were doing what they had a right to do under the express terms of the building contract, if the liens were in fact valid and good as against the building which fact seems to us to be admitted by the above quoted portion of the stipulation. In *Kocher v. Mayberry*, 15 Tex. Civ. App. 342, 39 S. W. 604, disposing of a similar contention, the court said:

“The evidence showed clearly that plaintiff owed the sums to the men, who had done parts of the work, and that they were seeking to fix liens upon defendant’s property. It is unnecessary for us to go into a minute investigation to ascertain whether they had secured their liens or not. They had the right to do so, and defendant could, we think, recognize it and pay them, if he owed plaintiff a balance. He is not to be

Aug. 1919]

Opinion Per PARKER, J.

treated as a mere volunteer. Whether he was in fact compelled to pay or not, he could have been compelled to do so, and when he paid the sums, which defendant admits he owed the men, equity should subrogate him to the rights of those whose claims he had discharged."

See, also, *Bagaglio v. Paolino*, 35 R. I. 171, 85 Atl. 1048, 44 L. R. A. (N. S.) 80. Our own decision in *University State Bank v. Steeves*, 85 Wash. 55, 147 Pac. 645, and *Paul v. Vancouver*, 89 Wash. 331, 154 Pac. 453, lend support to this conclusion, though this exact question was not there presented.

Counsel for appellant invoke the provisions of Rem. Code, § 1139, reading as follows:

"The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed and materials furnished; and in all cases where a claim shall be filed under this chapter for labor performed or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which the claim is filed; and in case of judgment against the owner or his property, upon the lien, the owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of the judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor or if the owner shall have settled with the contractors in full, he shall be entitled to recover back from the contractor the amount, including costs for which the lien is established in excess of any sum that may remain due from him to the contractor."

The argument seems to be that this section renders it necessary that there be a formal adjudication of the existence of a lien right as against the owner's building before the owner can pay and satisfy such lien

claim and receive credit therefor upon the building contract price as against the contractor. We do not so read that section. We think it is not a limitation upon the right of the owner to protect his property by paying and satisfying valid liens thereon which the contractor should have paid, before incurring expense and costs in defending them and the rendering of final judgment establishing them, which would but increase the amount necessary to satisfy them.

The trial of this case had proceeded in the superior court to a point which seemed to be its conclusion, so far as the introduction of evidence was concerned, when the court announced its decision tentatively against the Sisters and in favor of appellant. Thereafter the court concluded to open the case for the receiving of further evidence, which was accordingly ordered, and upon further evidence being introduced, all parties being given an opportunity to be heard and produce further evidence, the judgment was rendered denying recovery, as already noticed. It is now argued that the trial court erred in opening the case for further evidence after announcing its tentative decision in favor of appellant. It is plain that no formal judgment was rendered in the announcement of such tentative decision, and that the trial court still had jurisdiction over the case. In opening the case for further evidence, the trial court was acting within its discretion, and plainly such discretion was not abused. *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20; *Reiff v. Coulter*, 47 Wash. 678, 92 Pac. 436; *Norton v. Pacific Power & Light Co.*, 79 Wash. 625, 140 Pac. 905.

It is finally contended in appellant's behalf, though we think inconsistently with the admissions made in the stipulation above quoted, and also inconsistently with statements made elsewhere in his brief, that the lien claims compromised and settled in the manner

Aug. 1919]

Statement of Case.

above noticed were not in fact such lien claims as could have been successfully asserted against the building. We deem it sufficient to say that the record quite convinces us that the lien claims so compromised and settled were valid lien claims against the building and could have been enforced as such had the trial of the foreclosure cases proceeded to final judgment, at least in an amount greater than the total amount paid by the Sisters in their compromise and satisfaction.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

[No. 15227. Department Two. August 6, 1919.]

C. M. STUBBS, *Respondent*, v. O. C. MOLBERGET *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS (380, 390)—USE OF STREETS—COLLISION AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY. It is negligence for the driver of an automobile to "cut the corner" in turning at a street intersection, in violation of law, especially where the streets were congested with traffic.

SAME (383, 391)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The driver of an automobile, struck by another which illegally "cut the corner," is not guilty of contributory negligence in not anticipating that the other car would violate the law, but assumed that it would continue legally, and gave all his attention to a crowd of people congregated on the corner he was approaching.

DAMAGES (62) — MEASURE OF DAMAGES — INJURIES TO PERSONAL PROPERTY. Plaintiff, whose car was damaged in a collision, is entitled to recover the cost of repairs and for time lost while the repairs were in progress.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 1, 1918, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

¹Reported in 182 Pac. 936.

C. M. Miller, for appellants.

Glen S. Corkery, for respondent.

FULLERTON, J.—The automobile of the respondent collided with the automobile of the appellants and was overturned and damaged. This action was brought to recover for the damages suffered. It was tried by the court sitting without a jury, and resulted in a judgment in favor of the respondent in the sum of \$540.39. The accident giving rise to the action occurred at the junction of Fremont avenue and Ewing street, in the city of Seattle, both public streets of that city. The respondent was driving north on Fremont avenue, while the appellants' driver drove south thereon to its junction with Ewing street, where he turned his automobile east into that street, colliding with the respondent's automobile after it had crossed the center of the street and was near the north side thereof.

There is not much room to question the appellants' negligence. At the time of the collision, their automobile was at a place in the street where it had no right to be. On entering Ewing street, the driver turned to the left of the center of the street—cut the corner, as the common phrase expresses it—while the law of the road, and the city ordinance as well, required him to drive to the right of the center of the street and to keep on the right-hand side of the street. Nor was there any reason shown for violating the rule. There was no fixed obstruction in the street which prevented travel in the ordinary way. There was, it is true, a congestion of automobile traffic on the streets at that time, and a considerable number of people had congregated at the street intersection for the purpose of taking the street cars running to a public park; but this, instead of furnishing a reason for violating the ordinance, rather made it an imperative duty to obey

Aug. 1919]

Opinion Per FULLETON, J.

it. It is for such occasions that rules and regulations are framed.

Whether the respondent was guilty of such contributory negligence as will prevent a recovery is a more serious question. There is a decided conflict in the evidence on it. According to the appellants' driver, the respondent was greatly exceeding the speed limit at this point. His evidence, and that of certain of his witnesses, also, is to the effect that he violated a provision of the ordinance by passing other automobiles headed in the same direction which had slowed up and were waiting to cross the intersecting street. But the respondent testifies, and in this he is corroborated by disinterested witnesses, that he passed the automobiles mentioned prior to the time they reached the street intersection, at a place where he had a right to pass them, and when he could do so without violating the rules of the road or the city ordinances, since they were traveling at a rate of speed less than the rate permitted by the ordinances. He further testifies that he slowed down on approaching the street to a speed much below the permitted speed limit, because of the people who had congregated there, and was traveling no faster than eight miles per hour while crossing the street. There is also in his favor the very persuasive fact before mentioned; he had entered the street and crossed its center before the collision occurred. Obviously it could not have occurred had the appellants pursued the course they were obligated by the ordinance and the rules of the road to pursue.

We have not overlooked the testimony of the appellants' driver to the effect that he had stopped his car before the collision and that the respondent ran into his car. The trial court, however, did not so find, and our perusal of the evidence leads us to believe the wit-

ness mistaken in this respect. Doubtless he attempted to stop when he saw that a collision was inevitable if he pursued his course, and perhaps he changed the course of his car in the attempt to avoid a collision, but the decided weight of the evidence is to the effect that both cars were in motion when the collision occurred. But we cannot think the fact, even if admitted, would convict the respondent of negligence. To so convict him he must either have actually seen the position of the appellants' car, or the situation must have been such as to make it his duty to see its position. Neither of these conditions is shown by the record. The respondent's testimony is that, when he was about to enter the street, he saw the appellants' car on Fremont avenue, beyond its intersection with Ewing street, in a position from which, if it continued on its direct course, it must pass to his left, or if it changed its course into Ewing street and pursued the regular way in so doing, it must pass behind him, and that he gave it no further thought, but gave his entire attention to the crowd of people congregated on the corner he was approaching, that he might run none of them down. Seemingly, he did all that the law required of him. He was not bound to anticipate that the appellants would depart from the regular course, and hence is not guilty of negligence, under the circumstances here shown, in failing so to do, even though the appellants did stop their car prior to the time of the collision.

The appellants complain of the amount of the recovery. The court allowed for the cost of repairing the automobile and for the time lost while the repairs were in progress, allowing nothing for the permanent injury to the car which could not be corrected by ordinary repairs. The amount of the recovery was well

Aug. 1919]

Opinion Per MAIN, J.

within the evidence, and we see no reason to disturb the judgment in that respect.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, and PARKER, JJ., concur.

[No. 15255. Department One. August 6, 1919.]

D. D. KELLY *et al.*, as *Executors etc.*, *Respondents*, v.
FRANK F. HINKHOUSE, *Appellant*.¹

PLEADING (132-1)—COPIES—"ITEMS OF ACCOUNT." Damages for breach of a land contract, claimed upon a cross-complaint, are not "items of account," within Rem. Code, § 284, providing that, where a pleading fails to set forth a copy of the instrument of writing or the items of an account relied upon, the party shall, upon demand, file a verified copy thereof or be precluded from giving evidence thereof.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered February 21, 1918, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

W. E. Southard and *N. W. Washington*, for appellant.

MAIN, J. — This action was brought to recover a money judgment for the balance claimed to be due on a written contract. The defendant, in his answer, after denying certain paragraphs of the complaint, pleads affirmatively by cross-complaint for damages claimed to have been sustained because the plaintiffs did not perform the contract sued upon in certain particulars in the manner required. The plaintiffs, by reply, denied the material matters pleaded in the cross-complaint. Upon the issues thus framed, the cause went to trial before the court without a jury, and resulted

¹Reported in 183 Pac. 86.

in a judgment in favor of the plaintiffs and a denial of the right of the defendant to recover on the cross-complaint. From this judgment, the defendant and cross-complainant appeals.

The facts out of which the litigation grew are these: The respondents had purchased from the state, on a contract, a one-half section of land in Douglas county. Upon this contract, certain payments had been made. On the 17th day of February, 1909, the respondents, by written contract, transferred and sold to the appellant all their rights under the contract with the state. The appellant, by the terms of the contract, was to have immediate possession. By the contract of sale to the appellant, the terms of payment were fixed. It was also provided that the respondents would plow 160 acres of the land on or before June 1st, 1909, for which they were to receive \$1.50 per acre. By another term of the contract, the respondents agreed to remove the brush from the land not later than May 10th, 1909. After the respondents had removed the brush and plowed the land, the appellant refused to make the payment provided for in the contract when such work should be done, claiming that the brush had not been properly removed and that the plowing was not done properly or within the time specified in the contract. As above indicated, the respondents brought the action to recover the balance due, claiming full performance. The appellant, in his cross-complaint, pleaded that the respondents had failed and refused to take the brush off the land as required by the contract, and that they failed to plow the 160 acres within the time agreed upon. For these breaches of the contract, damage was claimed on account of the failure to remove the brush, in the sum of \$450, and for failure to plow within the time agreed upon and in the manner provided by the contract, in the sum of \$500.

Aug. 1919]

Opinion Per MAIN, J.

Some time before the cause was tried, the respondents served upon the appellant or his attorney a demand for a bill of particulars for the items of damage claimed in the cross-complaint. This demand was not complied with. When the appellant offered evidence in support of the damages alleged in his cross-complaint, it was objected to because the demand for a bill of particulars had not been complied with. The evidence was admitted by the court, reserving a ruling. In deciding the case, the trial court was of the opinion that the evidence was improperly admitted because no bill of particulars had been furnished. Whether this ruling was correct depends upon the construction to be placed on § 284 of Rem. Code, which provides:

“It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. . . .”

It will be noticed that, under this statute, it is not necessary for a party to set forth in his pleading a copy of the instrument in writing “or the items of account therein alleged.” It is further provided that, if a demand in writing be delivered to the adverse party for a copy of the writing or items of account, as the case may be, and the same be not complied with within ten days after the demand, then the party failing to comply with such demand shall be precluded from giving evidence thereof.

The controlling question here is whether the respondents were entitled, under this statute, to an item-

ized statement of damages claimed by the appellant in his cross-complaint. The statute refers to "items of an account." The appellant, by his cross-complaint, does not seek to recover items of account. His action is for damages for breach of a contract. As we read the statute, damages for which recovery is sought by the cross-complaint are not included within its terms. Damages claimed for failure to remove brush and plow land, as required by the contract, are not items of account. It must be remembered that this is not a case where a motion was made asking that the court require the adverse party to furnish a bill of particulars.

The court was in error in refusing to consider the evidence offered in support of the cross-complaint. The respondents have made no appearance in this court, evidently realizing, upon further consideration, that the trial court was in error in holding that the damages pleaded in this case were such as came within the term "items of account" in the statute.

The judgment will be reversed, and the cause remanded with directions to the superior court to grant a new trial.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

Aug. 1919]

Statement of Case.

[No. 15256. Department One. August 6, 1919.]

M. D. ARCHIBALD, *Appellant*, v. NORTHERN PACIFIC
RAILROAD COMPANY, *Respondent*.¹

MASTER AND SERVANT (129) — INJURY TO EMPLOYEE — ACTIONS — PLEADING — ISSUES, PROOF AND VARIANCE. The state law and the Federal employers' liability act having established the same rules in actions against carriers engaged in both interstate and intrastate commerce, it is not a fatal variance, warranting a dismissal of the action, that the complaint, broad enough to cover both laws, pleads a cause of action under the Federal act (U. S. Comp. St. 1916, §§ 8657-8665), while the proof failed to bring plaintiff within the provisions of that act but did establish that he was an employee entitled to protection by the state law, Laws 1917, p. 96, § 19.

SAME (161) — ASSUMPTION OF RISKS — FELLOW SERVANTS — QUESTION FOR JURY. Plaintiff, a machinist's helper, instructed to protect his eyes from flying pieces of steel, does not, as a matter of law, assume the risk of negligence of the machinist in continuing the dangerous work while plaintiff, pursuant to instructions, was changing his position and had not reached a place of safety.

STATUTES (18) — SUBJECT AND TITLE — CARRIERS — WORKMEN'S COMPENSATION ACT. Section 19 of Laws of 1917, p. 96, excluding employees of carriers engaged in interstate and intrastate commerce from the operation of the industrial insurance act, is germane to and sufficiently included in the title, "Relating to the compensation of injured workmen," since the title need not be an index to the body of the act or express all details of the subject dealt with.

CONSTITUTIONAL LAW (103) — EQUAL PROTECTION OF LAWS — WORKMEN'S COMPENSATION ACT. Laws of 1917, p. 96, § 19, excluding employees of carriers engaged in interstate and intrastate commerce from the operation of the industrial insurance act and giving them the right to institute actions for personal injuries, does not deny the equal protection of the laws guaranteed by the 14th amendment of the Federal Constitution; since it was not the object to take from the states the right to classify the subjects of legislation where the classification is not arbitrary or unreasonable.

Appeal from a judgment of the superior court for
Spokane county, Carey, J., entered January 16, 1919,

¹Reported in 183 Pac. 95.

upon granting a nonsuit, dismissing an action for personal injuries sustained by a machinist's helper in shaping a forging. Reversed.

Plummer & Lavin, for appellant.

Cannon & Ferris and *F. J. McKevitt*, for respondent.

MACKINTOSH, J.—For a period of sixteen months, the appellant had been employed in the repair shop of the respondent as a machinist's helper, and while so employed one afternoon about four o'clock, he was assisting one Johnston, a machinist, in shaping a forging to be fitted upon an engine frame. In order to properly perform this work, Johnston was chiselling the forging, having marked it where it was to be chipped, and having set it in a vise. The tools used were the ordinary cold chisel and hammer. While Johnston was chiselling, the appellant was standing at Johnston's right, holding a torch in his right hand to enable Johnston to see the work he was engaged upon. At the time this particular work had been commenced, Johnston had warned the appellant of the danger to his eyes from flying particles of steel, and had told him to keep his eyes covered with one hand while holding the torch with the other. The appellant had heeded this warning by keeping the gloved left hand over his eyes. When the work had progressed for fifteen or twenty minutes, and had arrived at a point where the forging was to be chipped back, it became necessary for Johnston and the appellant to change places. Johnston ordered the appellant to shift his position so as to pass to Johnston's left side, and while getting into this position, he changed, or was in the act of changing, the torch to his left hand, and Johnston, in the meantime having recommenced his work from his new position, in striking the chisel

Aug. 1919]

Opinion Per MACKINTOSH, J.

caused a flying piece of steel to become lodged in the appellant's eye, this being the injury for which the action was commenced.

The allegations of negligence state that Johnston, without warning to the appellant and while he was changing his position as he had been directed to, and changing the torch as it became necessary by reason of the changed position, carelessly struck the chisel before the appellant had an opportunity to change the torch and thus free his right hand so that it might be used in protecting his eyes. A nonsuit having been granted, appellant is here and presents four questions for decision.

I. The complaint pleads a cause of action under the Federal employers' liability act [U. S. Comp. St. 1916, §§ 8657-8665], and contains no statement under separate and distinct counts under the state law. By the enactment of the legislature of 1917, contained in Laws of 1917, ch. 28, p. 96, § 19, the appellant and respondent have the same rights and are under the same liabilities and are subject to the same rules of evidence and the same defenses whether the action be prosecuted under the Federal employers' liability law or the state law. That is, the state law has established the same rules of evidence and procedure for actions against carriers engaged in both interstate and intrastate commerce as is provided by the Federal employers' liability act in the case of interstate carriers. The complaint in this case made allegations that, at the time of the injury, the respondent was engaged in interstate commerce, but the proof failed to establish this fact, and the appellant now tacitly admits that he did not bring himself within the provisions of the Federal employers' liability act. The respondent's claim is that the appellant, having elected to sue under the Federal act, was not entitled to have his case go to

the jury when he failed to prove that he came within the operation of that act, although the testimony established a cause of action under the state laws. The complaint was drawn broadly enough to entitle the plaintiff to relief under the Federal employers' liability act, and, by its terms, it was drawn under that act, there being no separate cause of action alleged under the state act. There is no question of the respondent having lost any right it may have had to move the case to the Federal court for trial. All the proof introduced was equally material and proper to establish a cause of action under either the Federal or the state law, and under both laws the respondent was entitled to and limited to the same defenses. The appellant failed to satisfactorily prove that he was such employee as was protected by the Federal act, but did establish by his proof that he was such an employee as was protected by the state act. This situation presents squarely for our determination the question of whether such conditions constitute a variance and failure of proof warranting the dismissal of the action.

In *Baird v. Northern Pac. R. Co.*, 78 Wash. 67, 138 Pac. 325, this court had under consideration a question very similar to this. There was a cause of action stated under both the Federal act and common law, and the parties had treated it, however, as a common law action, and while different issues and defenses were possible under the Federal act and at common law, yet the court said:

"There is no decision, so far as we are advised, which holds that, where a complaint states facts sufficient to show a liability at common law, proof admissible thereunder should be excluded on the ground of variance merely because the complaint also alleges that the railroad company was engaged in interstate

Aug. 1919]

Opinion Per MACKINTOSH, J.

commerce, and that the injured person was, at the time of the injury, engaged in work in aid of such commerce."

And further in the same case:

"Obviously, if, as held in the last quoted decision [*Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951], the Federal act did not repeal, but only superseded the common law in a proper case, then, in a case such as here presented, where both the complaint and proof showed that the appellant was not, at the time of his injury, engaged in any act connected with interstate commerce, but did state facts sufficient to show a right of recovery under the common law, it would have been positive error not to submit the case to the jury upon that theory."

The reasoning of the *Baird* case applied to the facts of the case at bar must lead to the conclusion that where, under the Federal act and state law, the parties stand in exactly the same relation to each other, and an action between them is subject to the same rules, under a complaint broad enough to cover both laws, the plaintiff is entitled to have his case proceed if there is sufficient proof to entitle him to recovery under either the act or the state law, notwithstanding the fact that his complaint may have indicated that it was based on the Federal act.

Corbett v. Boston & M. R., 219 Mass. 351, 107 N. E. 60, although it relates to two concurrent actions brought under the Federal act and under the Massachusetts act, contains reasoning that is apropos to our discussion.

"It [the Federal act] does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme and exclusive in its application to intrastate commerce as is the Federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the car-

rier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the state law. . . .

"The facts and not the pleadings determine whether the wrong done in any given case confers a right to recover under the Federal or under the state statute. The allegations in the plaintiff's declarations in these two actions do not constitute the test whether the jurisdiction of the court is under the Federal or state statute. These simply are the basis for a judicial inquiry into the facts which alone can determine that question. It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril. . . . This rule has been followed frequently in actions where it was doubtful whether the remedy of the plaintiff was under our employers' liability act or at common law. . . . It is equally applicable to the cases at bar. The principle is not changed in any material respect because the question relates to remedies afforded by the statutes of different sovereign powers, each exclusive within its own domain. The relief is sought in the same forum, for the state court has jurisdiction of the cause of action, whichever statute may be controlling. . . .

"There are strong practical considerations in the administration of justice which lead to the same result. It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the Federal act applies, and, if it in the end shall be decided that it does not, then to test by further litigation their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of

Aug. 1919]

Opinion Per MACKINTOSH, J.

error in the form of relief sought, he thus might be barred from a just recovery. Although both the Federal and state statutes as to amendments are liberal, . . . and are liberally interpreted in cases of this sort, . . . nevertheless, the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf.

"The Federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. . . . Whether a railroad employee is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not in harmony. . . . It would be a saving of expense both to the parties and to the commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals where only a single aspect of the incident could be open to investigation at one time."

If the court in that case was justified in concluding that two independent actions could properly be presented as one, then, in this case, we may hold that, in one action, the entire question may be tried out and the case submitted to the jury's consideration as being under the act which the proof shows is applicable to the situation.

Bravis v. Chicago, M. & St. P. R. Co., 217 Fed. 234, cited by the respondent, holds:

“It is said that the complaint, after its amendment, stated a good cause of action under the state laws and also under the Federal employers’ liability act, and it is insisted in view of that fact that the court erred in directing the verdict. This case does not present a complaint where, in separate counts, a cause of action is pleaded under the Federal act and another under the state law, and no election is made, and we do not determine the effect of a motion for a directed verdict in such a case. It presents a case where the plaintiff at the close of his own case so amended his complaint, which stated in a single count a cause of action under the state law, as to make it state a cause of action under the Federal employers’ liability act. The plaintiff thereby elected to abandon his cause of action under the state law and to insist upon a recovery under the Federal act. The defendant then moved for a directed verdict, and the court could not lawfully escape the decision of the only question thus presented, the question whether or not the evidence sustained the cause of action which alone the plaintiff had then pleaded and on which he had elected to rely. There was no error in its decision of that issue and the plaintiff was estopped from repudiating his election.”

This case differs from the case at bar in that the plaintiff, at the conclusion of his case, sought to amend his complaint so as to state a cause of action under the Federal act which was not sustained by his proof, and which amounted to an abandonment of the cause of action originally stated under the state law. Had the appellant in this case insisted that, at the time of the injury, he was engaged in interstate commerce and relied for his recovery upon the evidence introduced to establish that fact, which evidence was not sufficient, the *Bravis* case and the case at bar would be analogous.

Respondent has also cited the case of *Louisville &*

Aug. 1919]

Opinion Per MACKINTOSH, J.

N. R. Co. v. Strange's Adm'x, 156 Ky. 439, 161 S. W. 239, which contains a statement in support of the rule in the *Baird* case:

"Where the parties themselves and the rights and liabilities of the parties are precisely the same under both the State law and the Federal statute, there would doubtless be no good reason for requiring an election."

II. It is also urged that the evidence was not sufficient to allow the case to go to the jury, irrespective of the law applicable, for the reason that the plaintiff's testimony established his assumption of risk. It is argued that the work being done was of a simple character and the dangers incident to it were so open and apparent that the appellant must, as a matter of law, be held to have assumed the risk of injury as a part of this employment.

It may be true that the appellant should be held, as a person of ordinary intelligence and experience, to have appreciated the danger, but the negligence complained of was the negligence of Johnston, and the appellant is not, as a matter of law, to be held to have assumed the risk of Johnston's negligence. The testimony shows that the appellant was following Johnston's instructions in changing his position, and that, before he had an adequate opportunity to change that position and protect himself in the new position, Johnston, without warning, resumed the dangerous work. This presented a question of fact upon which the jury should have been allowed to pass, and this is true although the facts as testified to might have been materially different from those contained in the statement made by the appellant to the claim agent of the respondent soon after the injury. This presented a question of credibility, within the province of the jury to decide.

Reid v. Dickinson, 169 N. W. (Iowa) 673, was a case in its facts closely akin to this. The Iowa court, in reversing a directed verdict, said:

"It is apparent that plaintiff was injured while in the line of his employment, and while engaged in the very act which he was directed by defendant's foreman to do. Taking this record as it is before us, the jury might well find that the plaintiff had done the work assigned him in the usual and ordinary way. He had succeeded in loosening his end of the rail, and, while standing with his bar in the bolt hole waiting the action of his coemployee at the other end of the rail, the rail was suddenly turned with plaintiff's bar in the bolt hole, and the position of the bar changed by the act of turning. This threw it out of the position, and injury resulted to the plaintiff. Plaintiff was waiting for the employee at the other end to signal him that he had secured a bar hold on the rail sufficiently strong to enable him to turn the rail free from its position and loosen it from the pile. The record shows that his coemployee, without giving the warning which the plaintiff had reason to expect, and which the employee was directed to give, and upon which plaintiff relied, suddenly jerked the rail loose, causing plaintiff's bar to strike him upon the head.

"The jury could well have found that the cause of the injury was the sudden and unexpected movement of the plaintiff's assistant in suddenly jerking the rail loose without warning plaintiff that he was about to do so, and without warning plaintiff that the rail was in a position to be jerked at that end. It was said in *Caverhill v. Boston & M. Ry. Co.*, reported in 77 N. H. 330, 91 Atl. 917, that, whatever risks the deceased assumed as to the defendant's method of doing business, he did not assume the risk of injury from the negligence of another servant. For an injury so caused the statute expressly makes the employer liable.

"It was said by this court in *Byram v. Illinois Cent. R. Co.*, 172 Iowa 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067: 'It is clear that the plaintiff did not assume the risk arising out of the negligence of another employee; for this he could not anticipate or guard against.'"

Aug. 1919]

Opinion Per MACKINTOSH, J.

In *Cules v. Northern Pac. R. Co.*, 105 Wash. 281, 177 Pac. 830, occurs this statement:

“When, therefore, the men agreed upon a line of action and proceeded with the work in pursuance of the agreement, any departure therefrom by any number of the workmen would be a negligent act, whether wilfully or heedlessly performed, giving a workman injured thereby a right of action against them to recover for such injury; this on the principle that they failed to exercise that degree of care which ordinary prudence required of them under the given circumstances.”

So here, when Johnston directed the appellant to change his position and resumed the dangerous acts before the appellant had placed himself in a position of safety, a question of fact was presented to the jury as to whether this was negligence upon Johnston's part.

III. Chapter 28, § 19, p. 96, Laws of 1917, which provides for a cause of action against carriers engaged in interstate and intrastate commerce in all cases where liability does not exist under the Federal act, is a portion of a general act relating to the compensation of injured workmen and amending certain designated sections in the prior act on that subject. It is claimed by respondent that this section 19 is invalid for the reason that it relates to a subject not embraced in nor germane to that expressed in the title of the act, and is therefore in violation of section 19 of art. 2, of the state constitution.

“No bill shall embrace more than one subject, and that shall be expressed in the title.”

“As the Constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be

grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title." *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

"No elaborate statement of the subject of an act is necessary to meet the spirit of the constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required." *State ex rel. Seattle Electric Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. 831.

"A title may be as broad as the legislature sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained." *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035.

In *Thayer v. Snohomish Logging Co.*, 101 Wash. 458, 172 Pac. 552, there being a restrictive title, this court held:

"The language of an act should be construed in view of its title and lawful purposes, since the subject expressed in the title fixes a limit upon the scope of the act."

"The title of the act need not be an index to the body thereof nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice; and the title is sufficient if it give reasonable notice of the subject legislated upon." *Davis-Kaser Co. v. Colonial Fire Underwriters Ins. Co.*, 91 Wash. 383, 157 Pac. 870.

"This provision of the organic act above referred to was not intended to require details and particulars to be stated in the title of acts." *State ex rel. Great Northern R. Co. v. Superior Court*, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793.

"It is sufficient if it indicates to an inquiring mind the scope and purpose of the law. The title may be general and will include all matters incidental and

Aug. 1919]

Opinion Per MACKINTOSH, J.

germane thereto." *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914.

"The mention of a given subject in the title is notice of all things germane to that subject found in the act." *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938.

This, being an act relating to the compensation of injured workmen, is comprehensive enough to include all manner of compensation for such workmen and all the means by which such compensation may be obtained. The title does not indicate that the only compensation provided for is that which is obtained through industrial insurance, although we popularly speak of the act as an industrial insurance act. The act provides for compensation by industrial insurance in certain cases, and also provides for the obtaining of compensation by injured workmen from their employers by legal action, and in the section to which we are now confining our attention, provides, among other things, the defenses available to such employers. Compensation being the purpose and general scope of the act, section 19 is certainly germane thereto.

The title to the original act "Relating to the Compensation of Injured Workmen" contained the additional phrase: "Abolishing the doctrine of negligence as a ground of recovery against employers." This court, in referring to the title, said in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915D 154, L. R. A. 1916A 358:

"The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry in the state, and the employment of the language, further on in the title, 'abolishing the doctrine of negligence as a ground for recovery of damages against employers,' is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensa-

tion to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained."

IV. The fourth point raised is that the section in question violates § 1 of the 14th Amendment of the Federal constitution, in that it denies the equal protection of the laws to a given class of employees.

The determination of whether legislative acts "deny to any person within its jurisdiction the equal protection of the laws" is fraught with considerable difficulty. From the nature of the case, it is impossible to formulate a general definition which will meet the individual situation as it arises. The supreme court of the United States, in *Davidson v. New Orleans*, 96 U. S. 97, encountering this difficulty, says:

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Commenting upon this quotation, Hannis Taylor, in his work on "Due Process of Law," page 49, § 20, remarks:

"In a word, the rule is that when a citizen of the United States, as such, complains that a fundamental right guaranteed by the clauses in question has been taken away, the court will ascertain in that particular case whether the right is an incident of national citizenship, and as such within its protection, or an incident of state citizenship, whose protection belongs to the state alone. If it appears that the right claimed is an incident of national citizenship, then the ultimate question arising is, whether or no that right as pro-

Aug. 1919]

Opinion Per MACKINTOSH, J.

ted by the amendment has been actually taken away by state action, executive, legislative or judicial. The natural and inevitable tendency always impelling the court to narrow rather than extend its jurisdiction arises out of the principle of self-preservation. After stating that so long as the due process of law clause was only a part of the Fifth Amendment it 'has rarely been invoked in the judicial forum, or the more enlarged theatre of public discussion,' attention was called to the fact, as early as 1878, that 'while it has been a part of the Constitution, as a restraint upon the power of the states, only a few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their citizens of life, liberty, or property, without due process of law.' . . . For the last thirty-six years the court has been applying its rule of inclusion and exclusion to the ever rising tide of cases before it, and the result is a body of unique and profoundly important judicial literature which the author is now striving to condense and arrange in a more complete and systematic form than it has ever assumed before. This body of literature is unique because it embodies the result of an effort upon the part of the only court in the world's history ever endowed with such a power to annul national and state laws whenever they attempt to violate the rights of the national citizen as guaranteed by the national constitution."

The respondent, in support of his argument that section 19 is class legislation, insists that the right to institute an action for personal injuries is given to persons engaged "in the maintenance and operation of railroads doing interstate, foreign and intrastate commerce, and in the maintenance and construction of their equipment," and provides that such railroads shall, in actions against them, have available only such defenses as are available to interstate railroads or railroads engaged in interstate business under the Federal employers' liability act, and that constitutes a discrimination between the rights possessed by employees of

railroads, such as logging, interurban, street, etc., for the reason that workmen engaged upon railroads doing purely an intrastate business are subject to the same hazards as those workmen engaged in similar occupations upon railroads within the act. In other words, that an arbitrary classification exists, while there is no substantial distinction between the classes of workmen.

“The equal protection of the laws means the protection of equal laws, but this equality of protection is not violated by classification provided equal protection is afforded the members of each class. The power of the state to classify the objects of legislation is very broad. It is a matter of legislative discretion, and such classification will be upheld if it bears a reasonable relation to a proper object sought to be accomplished, even if it may appear unwise or unjust. The courts will not interfere with such classification unless the distinctions made are clearly arbitrary.” Taylor, *Due Process of Law*, page 725, § 458.

The supreme court of the United States had before it the employers' liability law of Indiana in *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 47 L. R. A. (N. S.) 84:

“It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow-servant from that which prevails as to other employments in that state. . . . But while conceding this the argument is that classification of railroad employes for the purpose of the doctrine of fellow-servant can only consistently with equality and uniformity embrace such employes when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from co-employes not subject to like hazards or employes engaged in other occupations. The argument is thus

Aug. 1919]

Opinion Per MACKINTOSH, J.

stated: 'Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employes incident to railroad hazards, but it does insist that to make this a constitutional exercise of legislative power the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employes is justified, yet as in operating railroads some employes are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employes are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employes collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the Fourteenth Amendment the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the

assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class."

See, also, *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, contains the statement:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. . . . That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

Vol. 6 R. C. L., pages 373 *et seq.*, contains a full discussion of this subject, citing a multitude of authorities supporting the principles here stated.

In the decision of this court in passing upon the constitutionality of the workmen's compensation act, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117

Aug. 1919]

Opinion Per MACKINTOSH, J.

Pac. 1101, 37 L. R. A. (N. S.) 466, a related question was considered (at page 197):

“It is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof.

“So in this instance, if the legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority.”

Based on these authorities, it must follow that section 19 (Laws of 1917, p. 96) does not deny the equal protection of the laws to the class of employees, as argued by respondent.

We reverse the judgment of the lower court and remand the case for a new trial.

HOLCOMB, C. J., TOLMAN, MAIN, and MITCHELL, JJ.,
concur.

[No. 15330. Department One. August 6, 1919.]

COLUMBIA SECURITY COMPANY, *Appellant*, v. AETNA
ACCIDENT & LIABILITY COMPANY, *Respondent*,
J. M. SCHUSTER, *Defendant*.¹

INDEMNITY (7) — PRINCIPAL AND SURETY (52) — BUILDING CONTRACTS — BOND — LIMITATIONS. A limitation in a contractor's bond requiring suit to be commenced within six months after the time fixed for the completion of the work is not controlling where there was a valid excuse for delay; and the surety company is foreclosed from raising the point where it induced delay until lien claims could be adjudicated in pending litigation.

INDEMNITY (10-1) — PRINCIPAL AND SURETY (47) — DEFENSES. It is no defense to an action upon a contractor's bond that the principal was not made a party, as required by the bond, where an order was made and complied with making him a party and an unsuccessful effort made to serve him, and no further insistence on the point was made, although the surety produced him as a witness.

SAME. A change in the plans and specifications increasing the cost more than twenty per cent, in violation of the terms of the contractor's bond, is not a defense to the action, where the extra liability was incurred through the unauthorized act of the architect without the owner's knowledge, and beyond the powers conferred in the contract.

SAME. Such a change in the plans and specifications will not defeat an action on the bond where the same was known and explained to surety's agent, when application for the bond was made, the plans and specifications being already abandoned before the bond was signed.

¹Reported in 183 Pac. 137.

Aug. 1919]

Opinion Per MITCHELL, J.

PRINCIPAL AND AGENT (50)—UNDISCLOSED PRINCIPAL—RIGHT OF ACTION. The fact that the general manager and agent of the owner was named as the obligee in a contractor's bond as the owner does not preclude the actual owner from bringing an action on the bond in its own name.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 23, 1919, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

O. C. Moore, for appellant.

Post, Russell & Higgins, for respondent.

MITCHELL, J.—T. C. Elliott, his wife, and certain of their children own all the stock in the plaintiff corporation, which was organized for the purpose of handling their property. T. C. Elliott, as secretary, treasurer and manager thereof, handled and directed its business affairs. It was the owner of real property, including a store building in Pullman, Washington, and on May 25, 1916, through its manager, entered into a written contract with one J. M. Schuster for the remodeling of the building, according to plans and specifications provided, at the agreed price of one thousand two hundred dollars (\$1,200). By the terms of the contract, the contractor was to provide all material and labor and complete the work by June 15, 1916. As a part of the same transaction, it was understood the contractor should furnish a bond with surety to assure the faithful performance of the contract, and, accordingly, upon the application of the contractor, for a consideration paid, the Aetna Accident & Liability Company, a corporation, as surety, with Schuster as principal, made and delivered the bond, in the sum of one thousand two hundred dollars (\$1,200), upon which this action was brought. The builder's contract and the bond run to T. C. Elliott, who is designated as the

owner of the building. The work was finished June 15-17, 1916. After payment to the contractor of nine hundred sixty dollars (\$960), plaintiff, to protect its property and on the order of the contractor, was compelled to pay, but without a suit, a materialman three hundred forty dollars and twenty-seven cents (\$340.-27); and further, a lien foreclosure suit by another materialman against this plaintiff, the contractor and T. C. Elliott, in which there was a judgment foreclosing the lien, together with the necessary expenditure by this plaintiff for its own attorney's fees and other charges in that suit, compelled plaintiff to pay the sum of six hundred two dollars and nineteen cents (\$602.19), making altogether seven hundred two dollars and forty-six cents (\$702.46) in excess of the contract price, for the recovery of which, with interest, this suit was brought. The case was tried before the court without a jury, and resulted in a judgment that plaintiff take nothing by the action.

In addition to general denials, respondent, the Aetna Accident & Liability Company, answered the complaint by three affirmative defenses, each of which withstood a general demurrer in the trial court and was then traversed by a reply.

The first affirmative defense is to the effect that the action, which was started on June 12, 1918, was not commenced within the time limit fixed by the terms of the bond. The defense is based on the provision in the bond that no action on it shall be had or maintained against the surety unless it be brought, and process served on the surety, within six months after the date or time fixed in the contract for the completion of the work mentioned therein, which, as already noticed, was June 15, 1916. The evidence shows that, shortly after the work was completed, Elliott notified respondent at its home office in Hartford, Connecticut, and its

Aug. 1919]

Opinion Per MITCHELL, J.

local agent at Pullman, Washington, that certain persons, naming them, made claims for material furnished in amounts specified, which with payments already made to the contractor would substantially exceed the contract price, and that respondent would be held responsible therefor under the terms of the bond; and that the contractor also made a charge for the same, claiming they were extras ordered by the architect, concerning which the notice stated they were without authority or the knowledge of the owner. Thereafter considerable correspondence took place between the parties, including notice to respondent that liens had been filed and that, if suits were brought, its assistance in defense thereof would be requested; and later on, within six months from the date fixed for the completion of the work, notice was given respondent that lien foreclosure suit had been filed, inclosing a copy of the summons and complaint, and requesting respondent to assume or assist in the defense. Respondent declined to take part in the suit, but at its request was kept posted as to its progress, including the judgment obtained by the plaintiff therein. After the judgment, which was paid by this appellant, appellant's demands that respondent pay the amount thereof were unavailing on the score that, as Schuster was thinking of appealing the case, respondent desired to wait until his attitude in that regard was settled. In this respect, respondent's admitted adjusting agent, Mr. Comfort, on January 14, 1918, wrote requesting a delay in taking any steps against the surety company, and further said:

"Before making any payment, our attitude is that the difficulty between Schuster and Elliott should be definitely settled so that Mr. Schuster will have no handling of the collateral."

And, again, on May 12, 1918, one month before this suit was brought, the respondent from its home office wrote:

"We should expect to hear from Mr. Comfort in a short time and you have nothing to lose by waiting until we are a little more fully informed concerning the entire matter."

The reasonableness and enforceability of the provision of such a bond, limiting the time within which an action shall be commenced for a breach, depend not alone upon the words of the bond and the contract, but also upon the facts of the particular case. The actual breach occurs when liens are filed and established by the judgment of a court. The limitation for commencing suit on the bond, in its strict sense, is not controlling, in spite of a reasonable and valid excuse for delay beyond that time. *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Ovington v. Aetna Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021; *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276.

As alleged by appellant in its reply to this defense, after setting out the facts, respondent by its conduct has foreclosed itself to any right it might otherwise have under this provision in the bond.

The second affirmative defense is that Schuster, the principal in the bond, was not made a party to the action. The bond provides "that the principal shall be made a party to any action, suit or proceeding had or maintained against the surety on this instrument," and it is contended the provision is a condition precedent to the bringing and maintaining of the action. At the commencement, Schuster was not made a party to the action, but in the process of settling the pleadings the court, having its attention called to this defense, made and entered an order that Schuster be

made a party defendant to the action. The order was complied with, and afterwards, prior to the trial, an unsuccessful effort was made through the office of the sheriff of the county in which the suit was pending to get service of the summons on Schuster. Thereafter no further insistence on the point was made by respondent in the trial court, although for the trial respondent procured the attendance of Mr. Schuster and called him as a witness. Under the circumstances, respondent may not complain because of lack of service upon the principal, even if otherwise it could insist upon the provision of the bond requiring the principal to be made a party to an action against the surety, in the face of another provision of the bond that the principal and the surety bind themselves, jointly and severally.

The third affirmative defense is that the plans and specifications were changed, whereby the cost of the work was increased more than twenty per cent, without the written consent of the surety, and in violation of one of the conditions of the obligation "that no change shall be made in the plans, specifications, terms, covenants and conditions of such contract which shall increase the amount to be paid the principal more than twenty per centum of the penalty of this instrument without the written consent of the surety." In our view, the proof answers this contention in two ways.

(1) The changes and additional cost of more than twenty per cent arose, directly and indirectly, almost exclusively by order of the architect requiring, during the course of the construction, larger iron beams or lintels installed than those called for in the plans and specifications. It is clear that appellant or its manager knew nothing about the change until the larger

beams were already on the ground and the contractor engaged in installing them, at which time, because of the lien statutes, liability to the one furnishing them had already accrued; and within a few days, upon completion of the work, on learning of the purpose to make an extra charge, or charge beyond the contract price, appellant promptly protested to respondent, and later resisted the lien foreclosure suit, unsuccessfully, however, manifestly because, under the lien statutes, an architect or contractor having charge of the construction or repair of a building is held to be the agent of the owner for the purpose of the establishment of a lien for material furnished.

The builder's contract and the specifications are made a part of the terms and conditions of the bond. The only provisions of the instruments claimed by respondent to have any bearing upon the authority of the architect to order changes and bind the appellant are as follows:

Art. II of the contract:

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect."

Art. III of the contract:

"The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby."

Aug. 1919]

Opinion Per MITCHELL, J.

Portions of the specifications as follows:

"All material must conform to the specifications The work shall be under the supervision and direction of the architect and his decision in matters concerning the intent and meaning in interpreting drawings and specifications shall be final and binding The contractor shall call the architect's attention to any improper design or apparent discrepancy in drawings before progressing with the work."

An architect is not, simply as such, a general agent. He and all third persons dealing with him are bound by the general rules of agency. In the present case, he had no authority to bind appellant beyond the terms of the contract with Schuster. The authority conferred was limited and defined. It was special and not general. The work to be done under the direction of the architect was the work mentioned in the contract, which in the respect in question was made definite and certain by the specifications. His power to condemn and order taken down and removed from the grounds all material as unsound or improper, or as in any way failing to conform to the drawings and specifications, falls far short of giving him any right to recast the drawings and specifications, upon a matter already perfectly clear and explicit, by substituting something else so increasing the total cost that, standing alone, would threaten, if not defeat, his employer's rights under the literal terms of a bond given to indemnify and assure the employer that the cost of the work would not exceed the amount mentioned in the contract. It was provided that all materials should conform to the specifications, that is, the specifications which were a part of the contract; and, while it was agreed that the decision of the architect in interpreting the intent and meaning of the drawings and specifications of the work under his supervision should be

final and binding, this cannot be considered as creating a sphere wherein the architect could, *sua sponte*, make radical changes in the specifications, already precise and certain, to the substantial disadvantage of the owner of the building. Contrary to the contention of respondent, the rule applicable here is given in 6 Cyc. 29, quoted with approval in *Schanen-Blair Co. Marble & Granite Works v. Sisters of Charity of the House of Providence*, 77 Wash. 256, 137 Pac. 468, as follows:

“The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer, his powers as agent being limited by the contract entered into between them. Thus, unless specially authorized, he is not entitled to change, alter, or modify the contract entered into by the builder and his employer; nor has he any authority to bind the owner by contracts for any work done upon or materials furnished for the structures concerning which he is employed; nor is he entitled to receive notice of an assignment of payments accruing on the contract so as to charge the owner with notice thereof.”

(2) The application for the bond was made to one Chapman, respondent's agent, on June 3, 1916, and the bond was executed and delivered on June 13, 1916, two or three days before the work was finished. On June 5, 1916, respondent's agent, already provided with the plans and specifications, regarding the application for a bond, visited the contractor at the building and made inquiries into the matter. The agent was not a witness at the trial, but as to a part of what occurred at the time of the agent's visit for writing the bond, Schuster testified as follows:

“Q. Did you confer with him? Did you go to Mr. Chapman himself? A. I went to Mr. Chapman, yes, and made application for the bond. Q. You advised him fully in regard to the work that was being done,

Aug. 1919]

Opinion Per MITCHELL, J.

and what the contract called for? A. Most decidedly, sir. . . . Q. Just tell me what he did do about it? You talked to Mr. Chapman about it? A. I had to get the bond. I just went to him and made the application, told him what I was going to do, and what the bond was to cover. . . . Q. You told Mr. Chapman that these changes had been made, a departure from the contract at the time he issued this bond? A. I certainly told him because he came down to the building when we were making the change. . . . Q. What objection did he make? A. He didn't make any objection. Q. He had seen the specifications and the plans at the time? A. He had seen the plans and specifications. Had to have them to get the bond. . . . Q. But you did let Mr. Chapman, as agent of the bonding company, know the facts? Mr. Russell: I object to that as repetition. He has answered that question two or three times. I think Mr. Moore is trying to get him to answer it a different way. The Court: Overruled. Q. Isn't that true? A. I tell you Mr. Chapman was there I know when we were making the change, and talked about it. He wanted to know why Mr. Jacobs [the architect] made such a mistake. Of course in order to clear myself I told him and everybody that Mr. Jacobs had, that he got the college engineer."

By a quotation from *Thompson v. Metropolitan Building Co.*, 95 Wash. 546, 164 Pac. 222, respondent insists the applicable rule here is:

"It is well settled that mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part. In order to bind him to the new undertaking, it is not sufficient that he passively acquiesce; he must actively consent to be bound by the terms of the new agreement."

But that rule is not applicable here. It is applicable in the case of a subsequent modification by the principal and creditor of an outstanding contract thereto-

fore signed by them and the surety; while, in the present case, the surety had not signed the contract, which, so far as the surety was concerned, had already been modified, and of which its agent was advised at the time he was engaged in the serious business of making the contract for his principal as surety or indemnitor. Respondent will not be permitted to say it received compensation upon the basis of drawings and specifications already abandoned, within its knowledge, at the time of making its contract, or otherwise than according to the changes being followed and of which it learned while seeking information for the purposes of its undertaking—the latter, not the former, was its contract.

Besides the affirmative answers referred to, it is contended by respondent that appellant can in no event have the benefit of the assurance contained in the bond, because it is not named as the beneficiary therein. At least, the bond was meant to protect the owner; that was the object to be accomplished. It mentions T. C. Elliott as owner of the building. He, or even the actual owner, for whom Elliott was acting as agent, was but the obligee, while the risk assumed by respondent was founded upon its trust and confidence in the conduct and ability of Schuster. The situation is controlled by the rule of law relied on in the case of *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602, Ann. Cas. 1918B 125, well stated in 2 C. J. 873, as follows:

“As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, it is a well established general rule that, where an agent on behalf of his principal, enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appear-

Aug. 1919]

Syllabus.

ing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest;"

The record shows appellant proved its case; and concluding that none of the defenses was established, the judgment is reversed with directions to the lower court to enter judgment for appellant for the amount demanded in its complaint, with interest from the date of the commencement of the action.

HOLCOMB, C. J., TOLMAN, MAIN, and MACKINTOSH, JJ., concur.

[No. 15332. Department One. August 6, 1919.]

H. R. CLARK *et al.*, Respondents, v. ALEX C. WILSON
et al., Appellants.¹

MUNICIPAL CORPORATIONS (379, 390)—USE OF STREETS—COLLISION AT CROSSING—NEGLIGENCE. The negligence of the driver of an automobile in collision with a motorcycle at a street intersection is a question for the jury where there was evidence that, on reaching the crossing, the defendant first stopped, inviting the motorcyclist to pass in front, then started, inviting him to pass behind, and again started and stopped, when if he had not halted, he would have proceeded across in safety.

SAME (383, 391)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a motorcycle policeman traveling 35 or 40 miles in the line of his duty, where the view was unobstructed, in collision with an automobile at a street intersection, is a question for the jury, where he had the right of way, was not limited as to speed, and was misled by the indecision and repeated stopping and starting of the driver of the automobile.

SAME (379, 392)—MEETINGS AND CROSSINGS—INSTRUCTIONS. In an action for injuries sustained by a motorcycle policeman in collision with an automobile at a street intersection, where the view was unobstructed, instructions are proper which declare that, if defend-

¹Reported in 183 Pac. 103.

ant, as a reasonably prudent man, had reason to believe that plaintiff was a policeman, it was his duty to stop and allow him to pass, and that it was negligent for him to first stop to allow him to pass in front, and to then start up and drive in front of him.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 21, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained in a collision between a motorcycle and an automobile. Affirmed.

S. D. Wingate, for appellants.

Tucker & Hyland and *S. H. Steele*, for respondents.

MAIN, J.—The purpose of this action was to recover damages for personal injuries. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs. Motions for judgment notwithstanding the verdict and, in the alternative, for a new trial were made and overruled. Judgment was entered upon the verdict, from which the defendants appeal.

The undisputed facts, and the facts which the jury had a right to find from the evidence, may be stated as follows: The respondent H. R. Clark was a motorcycle policeman in the employ of the city of Seattle. On the evening of May 16, 1917, at about 9 o'clock p. m., while he was responding to an emergency call in the line of his duty, the motorcycle upon which he was riding collided with the Ford roadster automobile, near the northwest corner of the intersection of Fourth avenue and Bell street, driven by the appellant Alex C. Wilson.

The two streets mentioned intersect at right angles. Bell street is thirty-eight feet, and Fourth avenue fifty-four feet from curb to curb. Before reaching this

Aug. 1919]

Opinion Per MAIN, J.

intersection, the respondent was driving north on the east side of Fourth avenue. The appellant was driving west on the north side of Bell street. From the time that the appellant entered Bell street, a block to the east, until the time of the collision, there was nothing to prevent one of the parties from seeing the other, excepting a garage thirty feet in width which stood 230 feet south of the south curb of Bell street and fronted to the west on Fourth avenue. The respondent saw the automobile approaching before his view was obscured by the garage. The appellant, as he approached the intersection, observed the approaching motorcycle. From the time when the parties reached the respective points where their vision would no longer be obscured by the garage, each saw the other continuously. The motorcycle was traveling at the rate of from thirty-five to forty miles per hour. The automobile, before reaching the intersection stated, was traveling at approximately from twelve to fifteen miles per hour.

As the appellant came to the intersection, the motorcycle was approximately 250 feet south of the south line of Bell street. The evidence on the part of the respondent is that, after the appellant entered the intersection, he stopped or slowed his automobile as though he were going to stop, then started, and again stopped and started. The respondent construed the stopping of the automobile as an invitation to pass in front, and the starting again as an invitation to pass at the rear. When the appellant stopped the second time, the respondent swung his motorcycle to pass in front, believing that the automobile would remain standing. It again started, the appellant at that time making an effort to turn to the right down Fourth avenue, and the collision occurred a little to the north

of the northwest corner of the intersection of the streets named and about fifteen feet from the west curb of Fourth avenue. The space between the automobile and the curb was not sufficient, at the speed at which the motorcycle was traveling, to enable it to make the turn to pass through in safety.

At the time the collision occurred, the motorcycle was traveling rapidly and hit the automobile a heavy blow. The respondent was thrown from the motorcycle and sustained the injuries for which he seeks recovery in this action.

The appellant first contends that the evidence fails to show negligence on his part. This being an action tried to a jury, we are not concerned with the evidence further than to inquire whether there was substantial evidence from which the jury might have found negligence. If the appellant, on entering the intersection, started and stopped, as the respondent testified that he did, there was certainly ample evidence to take the question of negligence to the jury. As the appellant entered the intersection, the motorcycle was at least 150 feet away and was traveling at the rate of thirty-five or forty miles per hour. Had the appellant proceeded across without halting, it is clear that he would have crossed the intersection before the arrival of the motorcycle. Had he stopped and remained still, the motorcycle would have passed and the collision would have been avoided.

The second point is that the respondent was guilty of contributory negligence. There is no merit in this claim. At least, under the evidence, it was a question for the jury. Under the traffic ordinances of the city of Seattle, the motorcycle policeman had the right of way at the crossing, and was not limited to the speed prescribed for ordinary vehicles. Even though he had the right of way and was not subject to the speed regula-

Aug. 1919]

Opinion Per MAIN, J.

tions, this would not absolve him from exercising due care. The street at this time was dry. The accident occurred in a portion of the city known as the Denny Hill Regrade, in which there is much vacant property. At the time of the accident, there was no other traffic on the street in the immediate vicinity. Under such circumstances, it cannot be held, as a matter of law, that the respondent, in traveling at the rate of thirty-five or forty miles per hour, answering an emergency call in the line of his duty, would be guilty of contributory negligence. In this connection the appellant cites the case of *Miner v. Rembt*, 178 App. Div. 173, 164 N. Y. Supp. 945, as being closely in point. There are, however, two or three material distinctions between that case and the facts in the present case. There the accident happened at a crowded street junction. The motorcycle upon which the plaintiff was riding was masked by a fence along the street. Here the accident did not happen at a crowded intersection and the parties saw each other in ample time to have avoided the accident. In addition to this, in that case the defendant's conduct, after entering the intersection, was not such as to mislead the plaintiff as to whether he intended to stop or continue his movement. Here the conduct of the appellant was such as to invite the respondent, at one instant, to pass to the rear of him, and, at another, to pass in front. The other cases cited are less closely in point than is the one referred to and need not be here noticed in detail.

Finally, it is claimed that the trial court committed error in submitting the case to the jury. The instruction to which the objection is made may be divided into two parts, in the first of which the jury were told that, if they found from the evidence that the appellant, before entering the intersection, saw or heard, or, acting as a reasonably prudent man, could have seen

or heard, the respondent approaching and knew, or, as a reasonably prudent man, had reason to believe, that he was a policeman, then it was the duty of appellant to have stopped before entering the intersection and permit the motorcycle to pass. As we have already said, the respondent had the right of way. The evidence is that the motorcycle was making a great deal of noise, being driven with the muffler open and the horn being sounded. Some of the witnesses testify that it could have been heard for a distance of three or four blocks. The instruction tells the jury that, if the appellant knew, or, as a reasonably prudent man, had reason to believe, that the driver of the approaching vehicle was a policeman, then it was his duty to stop and permit the motorcycle to pass. The instruction is no more than making effective the reservations of the traffic ordinances which give to motorcycle policemen or other emergency vehicles the right of way.

In the second part of the instruction the jury were told that, if the appellant, after entering the intersection and observing the rapid approach of the plaintiff, stopped or slowed down his automobile near the east side of Fourth avenue for the purpose of allowing the motorcycle to pass in front of him, and that respondent, in plain view and sight of the appellant, changed his course for that purpose, then, in that case, it would be negligence on the part of appellant to start his automobile and drive in front of respondent. If the appellant stopped or slowed down after entering the intersection, for the purpose of allowing the motorcycle to pass in front, and the driver of the motorcycle changed his course for that purpose, then it certainly would be negligence for the driver of the automobile to again start his machine and drive in front of the motorcycle. This is not only a correct rule of law, but is a sound rule of common sense. The instruction, in

Aug. 1919]

Opinion Per MITCHELL, J.

both its parts, correctly defined the law, and is therefore approved.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[Nos. 15414, 15415. Department One. August 6, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Hugh Govan, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent*.

THE STATE OF WASHINGTON, *on the Relation of Arvid Rydstrom, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent*.¹

CONSTITUTIONAL LAW (70)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATION—RELIEF BILLS—VALIDITY. The courts will not inquire into the constitutionality of Laws 1919, p. 299, making an appropriation for the relief of certain persons for services performed and material furnished to the state, although it is alleged that the act grants extra compensation for the performance of services under state contracts after performance of the contracts, in violation of Const., art. 2, § 25, and although fraud is alleged; since the courts cannot inquire into the motives of the legislature, or question the facts or impeach the judgment of a coordinate branch of the government.

Application filed in the supreme court June 13, 1919, for a writ of mandamus to compel the state auditor to issue warrants to the relators. Granted.

T. F. Trumbull, for relator Govan.

Sullivan & Christian, for relator Rydstrom.

The Attorney General, and *John H. Dunbar*, for respondent.

MITCHELL, J.—These two cases were presented together to the court, and are thus considered in deciding them. Each of the petitions alleges:

¹Reported in 183 Pac. 115.

“That at the 1919 session of the legislature of the state of Washington, an act was duly enacted by the legislature and approved by the Governor March 15, 1919, being chapter 128 of the Laws of 1919, page 299, a copy of which act is as follows:

“‘An act making appropriations for the relief of Arvid Rydstrom and David Govan for services performed and material furnished.

“‘Be it enacted by the Legislature of the State of Washington:

“‘Section 1. That the sum of twenty-seven thousand three hundred nineteen dollars and fifty-eight cents (\$27,319.58) is hereby appropriated from the public highway fund for the relief of Arvid Rydstrom for services performed and materials furnished the state, for which he has not been paid, and the state auditor is hereby authorized and directed to draw his warrants upon the state treasury in favor of said Arvid Rydstrom in the said amount.

“‘Sec. 2. That the sum of twelve thousand dollars (\$12,000) is hereby appropriated from the public highway fund for the relief of David Govan for services performed and materials furnished the state, for which he has not been paid, and the state auditor is hereby authorized and directed to draw his warrants upon the state treasury in favor of said David Govan in said amount.’ ”

That in one case the beneficiary named in the act, and in the other case the legal representative of the beneficiary named in the act, made application on June 13, 1919, to respondent, as state auditor, for a warrant drawn upon the state treasurer in the amount due under the terms of the law; that respondent refused in each case to draw such a warrant, giving as a reason his doubt as to the validity of the law; and that relator has no plain, speedy or adequate remedy in the ordinary course of the law. Each prays for a writ of mandamus to compel the issuance of the warrant.

In the Govan case, respondent has filed an answer

Aug. 1919]

Opinion Per MITCHELL, J.

wherein he alleged, substantially, as follows: That, in October, 1917, Govan entered into a contract with the state for clearing, grading, draining and surfacing a portion of state road No. 21, in accordance with the plans, stipulations and specifications which were made a part of the contract; that, among other things, the contract provided:

"Payments shall be made for work and labor performed and materials furnished under this contract according to the schedule of rates and prices hereto attached and made a part hereof, and in no other manner whatsoever. The state highway commissioner shall determine the unit quantities and proper classifications of all work done and materials furnished under the provisions of this agreement, and his determination thereof shall be final and conclusive and binding upon the contractor."

That, after entering upon the performance of the contract, partial payments were made as provided therein; that, about August 16, 1918, Govan made an assignment of all sums due or to become due under the contract, to the Maryland Casualty Company; that the contract was completed in October, 1918, and a final estimate of all sums due, to wit, eight thousand five hundred five dollars and twenty-three cents (\$8,505.-23), was made and approved by Govan; that the final estimate was approved by the highway commissioner on February 21, 1919, and in April, 1919, state warrants therefor were drawn by respondent, payable and delivered to the assignee, Maryland Casualty Company, who accepted the same in full and complete payment of all sums due Govan and the casualty company by reason of the assignment referred to, and that the warrants were paid by the state treasurer; that said Govan, his executors, etc., have been paid in full for all services and material furnished; that, by the appropriation, the legislature attempted to grant to

Govan extra compensation for the performance of the services under the contract after the contract had been entered into and the services rendered, in violation of § 25, art. 2, of the state constitution; and that said appropriation is invalid for the further reason that it directs the expenditure of public money for a private purpose and takes the property of the taxpayers without just compensation and without due process of law, in violation of §§ 5 and 7, art. 8, and of §§ 3 and 16, art. 1, of the state constitution, and of the fourteenth amendment to the Federal constitution.

The answer in the Rydstrom case is, *mutatis mutandis*, essentially similar. To such answers relators, respectively, have filed demurrers on the grounds as follows:

“(1) That the court has no jurisdiction to determine or adjudicate the matters therein alleged.

“(2) The court has no jurisdiction over the subject-matter and things therein alleged.

“(3) That it affirmatively appears that the legislative department of the state has already determined and adjudicated the matters and things therein alleged, and the determination by the legislature is conclusive upon the courts.

“(4) That the allegations contained in the affirmative answer are insufficient to constitute a defense herein.”

Although by a provision of the constitution and an act of the legislature in pursuance thereof the state has agreed it may be sued, nevertheless it has the power, without litigation, to provide relief by way of compensation on account of services rendered or material furnished for its benefit. If this is in fact such a law as it purports upon its face to be, there can be no question that it does not offend any of the provisions of the state and Federal constitutions invoked by the *Attorney General*. On the contrary, if it does not

Aug. 1919]

Opinion Per MITCHELL, J.

rest on such foundation, but proceeds from motives of the legislature, in spite of facts asserted in respondent's answer, it would possess none of the virtues or essentials of law under applicable constitutional limitations. However, by the demurrers interposed, relators contend that such a defense is not available to respondent, and with that contention we agree. Insisting there is power in the court to do so, respondent urges us to inquire into the allegations of fraud set out in the answers and to set aside the relief appropriation if those allegations shall be established by the evidence. Exactly what is sought by respondent is to have the court, as triers of facts, impeach the judgment of another and co-ordinate branch of the government, as triers of facts. In declining to do so, we rely not alone upon a consideration of the well-recognized delicacy of judicial interference with legislative powers, but also upon the cold and manifest reason that, by the clearly-defined and respected form of coordinate departments of our government, we have no power to do so. Courts may declare legislative enactments invalid in some cases, but not because judicial power is superior in degree or dignity to the legislative; and it will be found, according to the general rule, that such declarations are the results of consideration of the enactments as they appear upon their faces, or influenced by facts within common knowledge and of which courts take judicial notice. *State v. Sommerville*, 67 Wash. 638, 122 Pac. 324; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089. The act in question is fair upon its face. Such an appropriation should rest upon facts justifying the relief granted, which is the case here, for, as was said in *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717:

"If evidence was required of a fact, it must be supposed that it was before the legislature when the act

was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding."

See, also, Cooley, *Constitutional Limitations* (7th ed.), 257; *State ex rel. Attorney General v. County of Dorsey*, 28 Ark. 379; *Rumsey v. People*, 19 N. Y. 41.

Still further, if the text of the act itself be examined and applied, the same result will be reached; for it says: "For services performed and materials furnished the state for which he has not been paid." Concerning the subject of inquiry by the courts into legislative motives and facts upon which their enactments rest, Judge Cooley, in his work on *Constitutional Limitations* (7th ed.), at page 258, immediately following a statement essentially the same as that just above quoted from *Farquharson v. Yeargin*, has well said:

"And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

A few of the leading cases may be examined. *Farquharson v. Yeargin*, *supra*, was a case involving a special act of the legislature creating a new county. The constitution (Art. 11, § 3) declares that: "No new county shall be established which shall reduce any county to a population less than four thousand, nor shall a new county be formed containing a less population than two thousand." An attempt was made in the case to show that these provisions had been violated by the act creating Ferry county. The court, in deciding that the legislative finding as to the facts was conclusive, and quoting from another authority, said:

Aug. 1919]

Opinion Per MITCHELL, J.

“The legal presumption, therefore, is that, when the act creating the county of Ferry was passed, these facts had been proved to the satisfaction of the legislature; otherwise, that body would not and could not have passed the act. All of the members of the legislature were sworn to support the constitution of the state, and it is not to be presumed that the legislature would violate their oath of office by passing the act, without the proof necessary to enable them to do so. The act appears to have been approved by the governor, and the same presumption attaches to his act of approval. As was said by the supreme court of West Virginia in *Lusher v. Scites*, 4 W. Va. 11:

“‘To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine; and when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment; and that, too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case.’”

Continuing, we said:

“Courts, in considering such acts, unless contrary facts appear affirmatively in the act under consideration, must assume that legislative discretion has been properly exercised.”

In the case of *Barker v. State Fish Commission*, 88 Wash. 73, 152 Pac. 537, Ann. Cas. 1917D 810, the plaintiff sought to enjoin defendants from enforcing the provisions of the fisheries code of 1915, on the ground that the law, if enforced, would deny to him and all other gill-net fishermen privileges and immunities granted to others, in violation of art. 1, § 12, of the state constitution and of the fourteenth amendment to the Federal constitution. A demurrer to the

complaint opened the way for a discussion by the court of plaintiff's contention that the complaint presented a condition calling for the taking of evidence in court, concerning which it was said, at page 80:

"The suggestion that the court should hear evidence touching the question of the constitutionality of a statute is somewhat startling when the possible far-reaching effect of such a course is, upon reflection, rendered apparent. Manifestly, such is not the rule, as has been clearly pointed out in numerous decisions, among which are: *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. 230, 14 L. R. A. 459; *Pittsburgh, C. C. & St. L. R. Co. v. State*, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915D·458, and notes."

Other cases in this court, not further referred to, while possibly not so nearly in point, declare principles in harmony with these views.

The case of *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. 230, 14 L. R. A. 459, referred to in the case of *Barker v. State Fish Commission*, was similar to the present case. The legislature of California had passed a law for the relief of Stevenson, appropriating one hundred and twenty-five dollars (\$125) per month for twenty-one months, which he sought to enforce. The answer alleged that Stevenson never had any claim against the state and that the appropriation was intended as a gift, and then set up the fact that work on his own responsibility in surveying and charting a bay and certain rivers in California constituted the foundation of the alleged claim. The answer appealed to provisions of the state constitution which prohibited the legislature from making a gift to any individual, and which also provided that the legislature should have no power to grant any extra compensation or allowance to any officer, agent, servant or contractor, after services had been rendered or a contract entered into and performed

Aug. 1919]

Opinion Per MITCHELL, J.

wholly or in part. The court, after referring to the abuses the provisions of the constitution were intended to reach, and stating that, if the facts as alleged in the answer were true, the act of the legislature ought never to have been passed, said:

“But these facts do not appear upon the face of the act itself, and the question is thus presented, whether it is competent for the court in this or any form of action to receive evidence *aliunde* to establish such facts, and thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid.”

Further on the court said:

“In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the duty of the legislature before passing the bill, and of the governor before approving it, to become satisfied, in some appropriate way, that the facts exist, and no authority is conferred upon the courts to hear evidence and determine, as a question of fact, whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself

to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice.”

The reason why the motive or purpose of the legislature in adopting laws may not be inquired into by the courts is fully and lucidly expressed in the case of *McCray v. United States*, 195 U. S. 27, at pages 54 and 55, as follows:

“The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. . . .

“It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.”

The *Attorney General*, criticizing the rule announced in *Stevenson v. Colgan*, *supra*, says:

“The court contradicts itself in the same paragraph because if it takes an explicit provision in the constitution to empower the court to ascertain facts upon which the legislative action was based, then certainly it would require constitutional authority to enable the court to take judicial notice either of those facts or of such other facts as the court might deem material.”

In respect to a judicial review, there is a vast difference between the finding by the legislature of the existence of facts of a disputable sort and a declaration

Aug. 1919]

Opinion Per MITCHELL, J.

by it attempting to establish a right or prohibit a wrong dependent upon the existence of facts of a character with reference to which there can be no dispute. This is clearly illustrated by the case of *Zimmerman v. Brooks*, 118 Ky. 85, 80 S. W. 443, cited by respondent. It involved the validity of an act of the legislature of Kentucky creating a new county, the area of which was described in the act by metes and bounds, and taken from the territory of three counties theretofore established. The constitution of that state provided:

“No new county shall be created by the General Assembly which will reduce the county or counties, or either of them, from which it shall be taken, to less area than four hundred square miles; nor shall any county be formed of less area; . . .”

The court, in effect, held the act invalid because the area included within the calls of the description showed the new county attempted to be created would contain less than four hundred square miles, and that it would reduce the area of counties, of which it must take judicial knowledge, from which it was taken to less than four hundred square miles. In such a case it is apparent the validity of the law appeared upon the face of the act and other acts of the legislature creating the old counties, of which by all authority the court must take judicial notice, to the same effect as if the former acts creating the old counties were a part of the act under consideration to the same extent as if rewritten therein. It is true that, after thus practically deciding the case, the court, in resting its judgment, preferred to go further and allow the filing of a petition in intervention by one of the old counties, which presented questions of fact requiring a judicial inquiry, but for the expressed reason that a county, such as the intervener, being a corporation, its rights are as sacred as any other rights guaranteed by the

constitution to other corporations or private persons, and that the statute, if allowed to stand, would, under the situation, prejudice its private rights, and likened it to a case of attempting to take private property for public purposes without just compensation. This, like the rate cases relied on by respondent, refers to an entirely different class of cases which involve private rights alone and are protected by the due process of law clauses of the state and Federal constitutions.

The case of *Cook County v. Chicago Industrial School*, 125 Ill. 540, 18 N. E. 183, 8 Am. St. 386, 1 L. R. A. 437, is one in which the statute involved contained no finding of fact whatever and, by its nature and terms, required none by the legislature or the court. It was one making an appropriation to take care of dependent girls. The controversy was whether or not the plaintiff, a religious institution, was entitled to collect pay for the care of such girls, because of the inhibition of § 3, art. 8, of the Illinois constitution against any payment from public funds in aid of any sectarian institution.

Respondent urges upon our consideration the case of *State ex rel. Consolidated Stone Co. v. Houser*, 125 Wis. 256, 104 N. W. 77, 110 Am. St. 824. It was a case in which the legislature had made an appropriation to pay for material used in the construction of a public building. Upon refusal of the secretary of state to issue a warrant, the beneficiary brought an action to compel him to do so. The trouble with the case, for the purpose of throwing any light upon our present inquiry, is that, in the petition for a writ of mandamus, the relator, with much detail, set out a state of facts which it was claimed by the petitioner induced the legislature to pass the act, which conclusively showed that the act, as the court said, "was merely an attempt to donate from the public treasury the amounts therein

Aug. 1919]

Opinion Per MITCHELL, J.

mentioned to the private persons therein named in payment of Mr. Bentley's private indebtedness to them." The court held the appropriation act invalid, but in doing so received no evidence, but simply took the statute to mean what petitioner alleged it meant, nor did it discuss the question of a judicial review of legislative findings of fact necessary to support an appropriation for the relief of an individual.

Other cases cited by respondent have been examined by us, but are not discussed herein because not applicable to the particular question in this case.

We conclude that the appropriation act in question is a valid one, and in the Rydstrom case the writ will issue as prayed for. In the Govan case, we notice the answer of respondent denies the death of David Govan, the beneficiary under the act, and denies the representative character of relator, Hugh Govan, which present issues of fact to be tried out. If the issues are more than formal, upon advice to that effect an order will be made for trial; otherwise the writ will issue in the Govan case as prayed for.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15441. Department Two. August 6, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Alma Lister, Executrix etc., Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*¹

STATES (26, 27)—APPROPRIATIONS — REQUISITES — OPERATION AND EFFECT. The courts cannot inquire into the motives or impeach the judgment of the legislature in appropriating in the general appropriation bill the sum of \$5,000 for the relief of Governor Lister, notwithstanding the nature of the service or value given to the state is not stated in the bill.

Application filed in the supreme court July 7, 1919, for a writ of mandamus to compel the state auditor to issue a warrant to the relator. Granted.

Hayden, Langhorne & Metzger, for relator.

The Attorney General, for respondent.

PARKER, J.—The relator seeks a writ of mandate from this court to compel the state auditor to issue his warrant for the sum of \$5,000 against the general fund of the state, payable to her as executrix of the last will and testament of Ernest Lister, deceased, resting her claim thereto upon an item in the general appropriation act passed by the legislature of 1919, reading as follows:

“FROM THE GENERAL FUND

“For the relief of Ernest Lister.....\$5,000.00”
Laws of 1919, p. 687.

It is admitted that, since the passage of that act, Ernest Lister has died, and that the relator is now the duly appointed and qualified executrix of his last will and testament, with power to administer the whole of his estate. Our recent decision in the cases of *State ex rel. Govan v. Clausen* and *State ex rel. Ryd-*

¹Reported in 183 Pac. 120.

Aug. 1919]

Opinion Per PARKER, J.

strom v. Clausen, ante p. 133, 183 Pac. 115, wherein the question of the validity and constitutionality of similar appropriations was involved and reviewed at length, is, we think, controlling of the law of this case. The only difference between this appropriation and the ones involved in those cases is that, in those appropriations, Laws of 1919, p. 299, ch. 128, the nature of the service rendered to the state by the ones to whom the relief was granted was briefly stated in the act of appropriation; while in this appropriation the nature of the service or value given to the state by the one to whom the relief is granted is not stated in the act of appropriation. We think, however, that the reasons given in that decision for the sustaining of the appropriations are equally applicable and controlling in favor of the relator in this case. We conclude that the writ must be granted as prayed for. It is so ordered.

HOLCOMB, C. J., MAIN, BRIDGES, and MACKINTOSH, JJ.,
concur.

[No. 15166. Department Two. August 7, 1919.]

COLUMBIA RIVER TIMBER & LOGGING COMPANY,
Respondent, v. COMMISSIONERS OF DIKING
DISTRICT No. 2, OF WAHIAKUM COUNTY,
et al., *Appellants*.¹

DRAINS (7)—DISTRICTS—POWERS—STATUTES. A diking district organized under Rem. Code, § 4091 *et seq.*, becomes a legal entity as a public corporation, and its commissioners, under §§ 4104, 4122, have discretionary powers which will not be reviewed by the courts in the absence of fraud.

SAME (7)—DISTRICTS—POWERS—CONTROL BY COURTS. There is no sufficient evidence of fraud or arbitrary action by commissioners of a diking district to warrant interference by the courts, where it merely appears that there was a difference of opinion as to the necessity for the more elaborate improvements decided upon by the commissioners and increasing the cost, and a conflict in the evidence as to whether the attorney employed by them expected to profit in some improper way in the letting of the contract and the sale of bonds.

SAME (13-1) — DISTRICTS — LIABILITIES—CONTRACTS—VALIDITY. It cannot be said that the commissioners abused their discretion in employing an attorney for \$3,000 to do all the legal work in connection with the construction of an improvement costing \$168,000, including the assessment of benefits and damages in eminent domain proceedings.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered May 8, 1918, in favor of the plaintiff, in an action for equitable relief, tried to the court. Reversed.

W. F. Magill, for appellants.

Crass & Hardin, for respondent.

PARKER, J.—The plaintiff logging company, owner of land situated in Diking District No. 2, of Wahkiakum county, commenced this action in the superior court for that county, seeking to have the organization of

¹Reported in 183 Pac. 134.

the district declared void, and to have the acts of its commissioners declared void and of no effect. William Stuart was made a defendant because he had been employed by the commissioners as attorney for the district, and there had been issued to him warrants of the district in part payment of his compensation; the relief sought being rested on the ground of fraud on the part of the commissioners and Stuart. A trial upon the merits resulted in a decree being rendered by the court adjudging that the district was legally organized and that the commissioners were duly elected and qualified; adjudging that the plans and specifications prepared for the proposed improvement by Baar & Cunningham, the engineers employed by the commissioners, which plans and specifications were adopted by the commissioners, "are unreasonable, nonworkable and impracticable, are excessively expensive and were arbitrarily adopted by the board of diking commissioners without due consideration for the interests of the respective property owners within said diking district," and enjoining the commissioners "from continuing or proceeding further with, or by virtue of, the plans and specifications prepared by Baar and Cunningham and adopted by said diking commission"; adjudging that the contract of employment entered into by the commissioners with Stuart, as attorney for the district, was "constructively fraudulent"; that the contract be annulled and set aside, and that the commissioners be enjoined from paying to Stuart any further sums under the contract, and that the payment of warrants already issued to him under the contract in part payment for his services be enjoined; adjudging that the employment of Baar & Cunningham as engineers for the district was unreasonable and excessive as to their compensation; that, in the employment of such engineers, the com-

missioners acted arbitrarily and not for the best interests of the property owners of the district, and that Baar & Cunningham are entitled to receive only a reasonable compensation for the actual services rendered by them, and not payment for such services under their contract; and finally, adjudging and directing that the commissioners "proceed *de novo* in the matter of carrying out the improvement." From this disposition of the case, the commissioners and Stuart have appealed to this court. No appeal is taken by the plaintiff from that portion of the decree which adjudges the district to have been legally organized and the commissioners duly elected and qualified.

This diking district was organized under the diking law of 1895 and the amendments thereto, now found in Rem. Code, §§ 4091 to 4136-5, inclusive. Let us first see just what the nature of a diking district is, and what the powers and duties of the commissioners are, under this law. Section 4091 reads in part as follows:

"Said district shall be known and designated as diking district No. (here insert number) of the county of (here insert the name of county) of the state of Washington, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession, and shall adopt and use a seal. The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such diking district, have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties,"

Section 4097 reads in part as follows:

"All diking districts organized under the provisions of this act shall have the right of eminent domain with

the power by and through its board or [of] commissioners to cause to be condemned and appropriated private property for the use of said organization, in the construction and maintenance of a system of dikes and make just compensation therefor; . . .”

Section 4102 reads in part as follows:

“Said board of dike commissioners hereinbefore provided for shall have the exclusive charge of the construction and maintenance of all dikes or dike systems which may be constructed within the said district, and shall be the executive officers thereof, with full power to bind said district by their acts in the performance of their duties, as provided by law. . . .”

Section 4103 reads in part as follows:

“Whenever it is desired to prosecute the construction of a system of dikes within said district, said district, by and through its board of commissioners, shall file a petition in the superior court of the county in which said district is located, setting forth therein the route over which the same is to be constructed, with a complete description thereof, together with specifications for its construction, with all necessary plats and plans thereof, together with the estimated cost of such proposed improvement. . . .”

This section contains considerable detail directions touching the preparing of data and filing of a petition in the superior court, looking to the trial in court of the question of compensation to property owners, in acquiring rights of way for dikes and ditches, and of the question of benefits to result from the proposed improvement to the several tracts of land in the district. Section 4104 reads as follows:

“In the preparation of the facts and data to be inserted in said petition and filed therewith for the purpose of presenting the matter to the said superior court, the board of commissioners of said diking district may employ one or more good and competent surveyors and draughtsmen to assist them in compiling

data required to be presented to the court with said petition as hereinbefore provided, and such legal assistance as may be necessary, with full power to bind said district for the compensation of such assistants or employees employed by them, and such services shall be taxed as costs in the suit."

Section 4122 reads in part as follows:

"The board of commissioners of such district shall elect one of their number chairman and one secretary, and shall keep minutes of all their meetings, and may issue warrants of such district in payment of all claims of indebtedness against such district. . . ."

These provisions of the statute render it plain that a diking district, when lawfully created, becomes a legal entity as a public corporation, and that its board of commissioners possess the usual discretionary powers of managing boards of public corporations, in so far as the powers and duties enumerated in the above quoted sections of the statute are concerned. This being so, let us be reminded of the elementary principle so well stated by Judge Dunbar, speaking for the court, in *State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144, 28 Pac. 369, as follows:

"No principle of equity jurisprudence is better established than that courts of equity will not sit in review of proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies the exercise of that discretion in good faith will not, in the absence of fraud, be disturbed. High on Injunctions (3d ed.), § 1240."

This is the controlling law of this case.

The organization of the district having been completed, the commissioners employed Stuart as attorney for the district, agreeing to pay him the total sum of \$3,000 for rendering all necessary legal services incident to the construction of the improvement, including the acquisition of the rights of way for the necessary

dikes and ditches and the assessment of damages and benefits to be determined in the eminent domain and assessment proceedings in court. The commissioners also employed Baar & Cunningham, engineers, to make surveys, prepare plans and specifications for the proposed improvement, and to superintend the construction after the letting of a contract therefor, agreeing to pay them for such services "five and one-third per cent of the total actual cost of the project." The engineers made final surveys and prepared detailed plans and specifications for the improvement, estimating the cost thereof at \$168,000. The commissioners then being about ready to present their petition to the superior court as provided in § 4103, above quoted from, looking to the acquisition of rights of way for the necessary dikes and ditches and the assessment of damages and benefits, the plaintiff commenced this action in equity in the superior court, which resulted in a decree, from which this appeal is prosecuted.

We have painstakingly reviewed the evidence contained in this voluminous record, and cannot escape the conclusion that the decree of the trial court has no more substantial foundation to rest upon than that the evidence furnishes some ground for arguing that the commissioners did not decide the matters they were called upon to decide, which are here in question, as those matters should have been decided. We think the evidence wholly fails to show any arbitrary or capricious action on the part of the commissioners, or any intent on their part to exercise other than their best judgment in employing Stuart as attorney, employing Baar & Cunningham as engineers, and in adopting the plans and specifications prepared by them for the improvement.

Touching the question of the adoption of the plans and specifications, W. G. Brown, an engineer and

owner of land in the district, testified in substance that, in his opinion, the plans and specifications called for an improvement more elaborate and extensive than was necessary, especially in that the adopted plans and specifications called for the construction of dikes somewhat higher than necessary, and that a sufficient improvement with lowered dikes could be constructed for approximately \$108,000. The evidence, we think, furnishes ample room for difference of opinion as to what the nature and extent of the improvement in this and some other particulars should be. Brown, as an owner of land in the district, had considerable to do with the promotion of the creating of the district and the defining of its boundaries, but did not prepare any detailed plans or specifications for the proposed improvement. He was an applicant for the position of engineer of the district and had offered to the commissioners to do the engineering work for a compensation of five per cent of the actual cost of the improvement, limiting his compensation to five per cent of \$110,000. The claim that the improvement would be more elaborate and extensive than necessary, according to the plans of the engineers, is supported almost wholly by the testimony of Brown alone, while the testimony of Mr. Cunningham, one of the engineers, is, we think, equally positive and apparently as trustworthy in support of the improvement being as elaborate as the plans and specifications prepared by his firm called for. Clearly, we think it was not such an abuse of discretion on the part of the commissioners, under the circumstances, to employ Baar & Cunningham and finally adopt their plans and specifications as to warrant interference therewith by the trial court. Aside from the question of actual fraud touching these questions, it seems to us that the case involves nothing but a question of difference of opinion concerning matters

which the commissioners were, by virtue of their position, called upon to decide as administrative officers.

The evidence touching the question of actual fraud was directed almost wholly to the alleged wrongdoing of Stuart; and according to the contentions of counsel for plaintiff, tended to show that Stuart had made improper proposals to one Randles, a contractor, and had entertained improper proposals from him, looking to the ultimate awarding of the construction contract to Randles without competition, by which Stuart in some way was to profit. Just how Stuart was to be able to bring about any such condition is not shown, except by the suggestion, which is practically wholly without support in the evidence, that he was going to be able to control the action of the commissioners when it came to awarding the contract. But we think the evidence touching these questions does not lend any support to the view that the commissioners were parties to any such contemplated wrong action on the part of Stuart. The evidence tending to show these alleged acts on the part of Stuart rests largely upon the testimony of Randles, which was taken by deposition, and which, in the main, was positively contradicted by the testimony of Stuart. True, there was some other evidence lending some support by way of side-lights to the claim that Stuart entertained some notion of improperly profiting in some way by the contract, or by the sale of the bonds of the district. But, upon the whole, we think it may be said that, even as to this question, the evidence was no more than fairly evenly balanced. But this, to our minds, is not a controlling question. It might be regarded as sufficient showing to warrant the commissioners in discharging Stuart as attorney for the district; but plainly it was not such as to warrant the court in interfering with the commissioners continuing the employment of

Stuart as attorney for the district, under his contract of employment, and fell far short of being a sufficient showing to warrant the court in interfering on the ground of fraud on the part of the commissioners.

As to the employment of Stuart at a total compensation of \$3,000 for all of the legal work to be done in connection with the construction of the improvement, acquiring of the rights of way, and the assessing of benefits and damages by eminent domain and assessment proceedings in court, being "constructively fraudulent," as it is characterized in the decree, such view of that action by the commissioners has no foundation other than the claim that the compensation is excessive. Plainly, we think, in view of the magnitude of the project and the probable amount of legal work to be performed under the contract, it cannot be said that the commissioners abused their discretion in agreeing to pay Stuart compensation in that amount.

We are quite convinced that to affirm the decree of the trial court would be but to sanction judicial interference with the discretion of the commissioners, in the exercise of which they are not guilty of either actual or constructive fraud, and that the decree must be reversed and the action dismissed. It is so ordered.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

Aug. 1919]

Opinion Per MAIN, J.

[No. 15230. Department One. August 7, 1919.]

GLADIE M. LARSON, *Administratrix etc., Appellant*, v.
J. L. ANDERSON, *Respondent*.¹

COSTS—SEPARATE ACTIONS—LIABILITY OF JOINT TORT FEASORS—ELECTION. Under Rem. Code, § 478, where joint tort feors are sued in separate actions when they might have been joined in one, the plaintiff makes an election by accepting costs in one action, and cannot recover costs in the other.

JUDGMENT (270)—RELEASE (6)—JOINT TORT FEASORS. The release and satisfaction of a judgment against one joint tort feisor operates as a release of a judgment recovered in another action against the other joint tort feisor for the same wrong, in a larger sum, as to both principal and interest; and it is immaterial that there was an understanding between the parties that the payment of the one judgment was to operate only as a *pro tanto* satisfaction of the other.

Appeal from an order of the superior court for King county, Jurey, J., entered September 17, 1918, requiring the plaintiff to cancel and satisfy a judgment against the defendant. Affirmed.

P. W. Willett and *O. L. Willett*, for appellant.

Byers & Byers, for respondent.

MAIN, J.—Gladie M. Larson, as administratrix of the estate of B. F. Richardson, brought an action against the Anderson Steamboat Company, a corporation, and J. L. Anderson, for the conversion of a boat known as the City of Bothell. The action was tried to a jury, and resulted in a verdict in favor of the plaintiff for the sum of \$2,350. After the verdict was entered, the trial court sustained a motion for judgment notwithstanding the verdict, and entered a judgment dismissing the action. From this action, an appeal was prosecuted, which resulted in a reversal

¹Reported in 132 Pac. 957.

and a direction that judgment be entered upon the verdict. *Larson v. Anderson*, 97 Wash. 484, 166 Pac. 774.

While that action was pending and before it went to final judgment, Gladie M. Larson, as administratrix, brought another action against Robert T. Hodge, as sheriff of King county, and his official bondsmen, for the loss of the same boat. This action resulted in a verdict and judgment in favor of the plaintiff for the sum of \$1,800. An appeal was prosecuted and the judgment was affirmed. *Larson v. Hodge*, 100 Wash. 419, 171 Pac. 251. After that judgment was affirmed, the plaintiff was paid in satisfaction thereof the sum of \$1,800, with interest and costs.

Thereafter, J. L. Anderson, one of the defendants in the action first referred to, moved the court for an order to require the plaintiff to cancel and satisfy the judgment against him *in toto*. An order was entered as requested by the motion, from which order this appeal is prosecuted.

The appellant, the plaintiff in both actions, makes the contention that the court was in error in requiring her to satisfy the costs incurred in the action against Anderson without the same having been paid. In *Larson v. Hodge*, *supra*, referring to the loss of the boat by the plaintiff and the part that the sheriff and Anderson, respectively, had therein, it was said:

"It was their joint acts that deprived plaintiff of the boat, and they thus become joint tortfeasors. . . . It is too well settled to need citation of authority that joint tortfeasors may be sued either jointly or severally, and that a judgment against one is not a bar to suit against another. While plaintiff can have but one satisfaction for her wrong, yet, as between Anderson and the sheriff, neither can set up anything less than a satisfaction of a judgment against the other as a bar to an action."

Aug. 1919]

Opinion Per MAIN, J.

As to whether Anderson and the sheriff are joint tortfeasors, further inquiry will not here be made, but the holding in the case against the sheriff, when it was here on appeal, that they were such, will be accepted. Since they were joint tortfeasors and they could have been sued jointly or separately, it follows, under the statute, Rem. Code, § 478, that the plaintiff was entitled to costs in one action only. That statute provides that, when several actions are brought for the same cause of action, against several parties "who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state." In this case the plaintiff, by accepting the costs in the action against the sheriff, made her election to take costs in that action.

Another contention is that it was error for the trial court to require the satisfaction of the judgment against Anderson except to the extent of \$1,800; or, in other words, that the plaintiff was entitled to the additional sum of \$550 before she should be required to satisfy the judgment against Anderson, which was the excess of the judgment in that case over the amount of the judgment in the case against the sheriff.

It is claimed that the receipt of the money upon the judgment in the case against the sheriff was under an agreement or understanding between the parties that it should operate only as a *pro tanto* satisfaction of the judgment in the case against Anderson. It is the rule in this state that the acceptance of money in satisfaction of a claim against one joint tortfeasor, even with the reservation that it is not to be considered as a release against another joint tortfeasor, operates

as a release of the latter. *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 69 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293; *Randall v. Gerrick*, 93 Wash. 522, 161 Pac. 357, L. R. A. 1918D 179.

Assuming that there was such an understanding as the appellant-claims, it would not prevent the payment of the judgment in the case against the sheriff from operating as a release of the judgment against Anderson. If the payment of the judgment in the case against the sheriff operated as a release of the judgment against Anderson, it would seem to follow that it would operate, not only as a release of the amount for which the judgment was entered, but also for the interest which may have accrued thereon. In this respect, no distinction could be made between the principal of the judgment and the interest.

It is unnecessary here to review authorities from other jurisdictions, as, under the holdings of this court, the law touching the controversy between the parties is settled.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

Aug. 1919]

Opinion Per MOUNT, J.

[No. 15264. Department Two. August 7, 1919.]

ROBERT BRUCE BROWN, *Appellant*, v. EUGENE G. BAKER
et al., *Respondents*.¹

PUBLIC LANDS (14)—RIGHTS ACQUIRED BY ENTRY—VESTED RIGHTS—PRICE. The only vested right that a successful contestant of a homestead entry has is the preference right for thirty days to enter upon the lands; and the general land office may, between the date of contract and date of entry, change the rules relating to the manner of acquisition of government lands, and can require that timber lands previously sold at \$2.50 per acre shall be appraised and sold at the appraised value.

SAME (19)—TIMBER AND STONE LANDS—"MINIMUM" PRICE—RIGHT TO CHANGE. 20 Stat. at L. 89, providing that the minimum price at which lands chiefly valuable for timber may be sold does not prevent the general land office from fixing a greater price and requiring an appraisement and sale at the appraised value.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 23, 1918, upon sustaining a demurrer to the complaint. Affirmed.

R. B. Brown (*Peters & Powell*, of counsel), for appellant.

Thomas A. Stiger and *John R. Dally*, for respondents.

MOUNT, J.—This action was brought to obtain a decree adjudging the title to certain real estate, patented by the United States to defendants, to be held by them in trust for the benefit of plaintiff. The trial court sustained a general demurrer to the complaint and dismissed the action. Plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. Plaintiff has appealed.

The complaint alleges the following facts: That, on the 8th day of November, 1905, the real estate in

¹Reported in 183 Pac. 89.

controversy was public surveyed lands subject to entry at the Seattle land office; that, on November 17, 1905, one Otto J. Larson entered upon said lands under the United States homestead laws at said time, filed an affidavit of prior settlement which, under the rules of the department, gave him a preference right dating back to July 14, 1905; that, on October 24, 1906, Larson made final proof and commuted his homestead entry to a cash entry; that, on July 31, 1907, the appellant contested the homestead entry of Larson, and upon a hearing of this contest, the register and receiver rendered their decision in said contest case in favor of the appellant; that Larson appealed from that decision to the general land office, thence to the Secretary of the Interior, resulting in each instance in an affirmance of the decision of the local land office; that Larson's entry was finally canceled and appellant was given thirty days from the date of notice thereof in which to exercise his preference right to file his entry upon the land; that, on February 25, 1910, within thirty days from the date of the cancellation of the Larson homestead entry, appellant made application to enter said lands under the stone and timber act of June 3, 1878, it having been shown, and the department having found, that the lands in question were chiefly valuable for timber; that this application was made upon the blanks and in the manner prescribed by the general land office which had been in use since the act of 1878 had become effective, up to November 30, 1908, at which last-named date a new form of application prescribed by the Secretary of the Interior and new regulations had gone into effect, which regulations, among other things, required the applicant to file an affidavit of the value of the lands sought to be entered, and also the value of the timber thereon, and further provided for the appraisement of said

Aug. 1919]

Opinion Per MOUNT, J.

lands and the timber thereon by an appraiser sent out for that purpose; and also provided that, after that date, no sale should be made under said act except as provided in such regulations; that the register and receiver of the local land office being divided in opinion as to the right of the appellant to file his application in the manner prescribed prior to November 30, 1908, the application was sent to the general land office and thence to the Secretary of the Interior, and resulted in a decision that the appellant was controlled by the new regulations and must pay the appraised value placed upon said lands and timber; that thereafter the lands were appraised at the sum of four thousand two hundred and twenty-five dollars (\$4,225), and subsequently reappraised at four thousand twenty-two dollars and fifty cents (\$4,022.50), which appellant refused to pay, but offered to pay two dollars and fifty cents (\$2.50) per acre, as all persons had paid before, appellant claiming this was the only price at which timber land could be sold under said act; that, while appellant was contesting these various questions before the department, the respondents Eugene G. Baker and wife moved upon the land in question with full knowledge of all the facts and of appellant's rights therein; and that, on November 17, 1917, patent was made and issued to said Eugene G. Baker under the United States homestead act, and he is still holding the lands under said patent.

The prayer of the complaint is that respondents may be adjudged to hold the patent to these lands as trustees for appellant, and that respondents be required to convey said lands to appellant upon the payment of the sum of four hundred dollars (\$400).

Appellant concedes upon this appeal that he may not litigate matters of fact which have been passed upon by the general land office, but argues that errors

of law committed by the land office may now be litigated in this action. We may concede these positions for the purpose of this case. Appellant then argues that he initiated his right on July 31, 1907, when he instituted the contest in the United States land office at Seattle against the entry of O. J. Larson; that his contest successfully ripened into a vested right beginning at that date; and that the land department could not thereafter make any change in the rules relating either to the price to be paid or to the construction which had previously been placed upon the timber and stone act.

Section 2, ch. 89, 21 Stat. at L. 140 ("An act for the relief of settlers on public lands"); 8 Fed. Stat. Ann. (2d ed.), page 598, provides:

"In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands:"

We think it is apparent that the only vested right which the appellant had upon the cancellation of the entry of Larson upon the lands was the preference right for thirty days to enter upon the lands. He acquired no vested interest in the land itself. We are also satisfied that the general land office might, between the date of the contest and the date of the entry filed by the appellant, legally change the rules relating to the manner of acquisition of government lands. It appears from the complaint that, prior to the contest above referred to, the land department had been selling these lands at the minimum price of two dollars and fifty cents (\$2.50) per acre, and that, between the time of the contest and the time of the entry by

Aug. 1919]

Opinion Per MOUNT, J.

appellant, the land department of the government changed this rule so that lands entered upon under the stone and timber act should be appraised and should be sold at the appraised value, rather than at the former price of two dollars and fifty cents (\$2.50) per acre. In *United States v. Braddock*, 50 Fed. 669, the court said, at page 672:

"It is perfectly clear that the mere filing of the application to purchase under this act confers upon the applicant no right as against the United States, and that, until the applicant has acquired a vested right in the land, it is within the power of the government to withdraw it from sale or make any other disposition of it. The filing of an application to purchase may initiate a right to purchase as against a subsequent applicant for the same privilege, but to say that the initiation of such a right imposes an obligation on the government to convey the title is to confound the manifest distinction pointed out by the supreme court in the *Yosemite Valley Case*, 15 Wall. 77, between the acquisition of a legal right to the land as against the owner, the United States, and the acquisition of a legal right as against other parties to be preferred in its purchase. 'It seems to us little less than absurd,' said the court in the case cited, 'to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.'"

See, also, the *Yosemite Valley Case* [*Hutchings v. Low*], 82 U. S. 77. What is there said, we think, settles the question that a mere filing creates no vested right in the land. The right of the government to change the rule, or to entirely withdraw the land from sale, was not affected by appellant's right to file at some later date.

Appellant also argues that the general land office had no authority to fix a greater price than two dollars and fifty cents (\$2.50) per acre upon this tract of land. Section 1 of the stone and timber act, 20 Stat. at L. 89 (9 Fed. Stat. Ann., 2d ed., page 606), provides as follows:

“That surveyed public lands of the United States within the public-land states, . . . valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; . . .”

Appellant contends that this section fixed the price of two dollars and fifty cents (\$2.50) per acre and that the general land office was without authority to change that price, and that, when he tendered that price to the land department, that department was bound to accept it, and the refusal was error of law which may now be corrected by the court. We think it is plain that this section fixes only the *minimum price* at which the land may be sold. The clear inference is that the general land office may fix a greater price. This was done and, at the time the appellant filed upon the land, he was required to file under the rules and regulations then promulgated by the general land office. The words “minimum price,” used in this section, mean the lowest price, and not a fixed price of two dollars and fifty cents (\$2.50) per acre. To hold otherwise would be to say that the words “minimum price” were superfluous and meant nothing. We are of the opinion, therefore, that the general land office or the secretary of the interior committed no error in law when a provision was made for the appraisalment of such lands,

Aug. 1919]

Opinion Per MAIN, J.

and that the lands should be sold at the appraised value and not at the minimum price.

From these considerations, we are led to the conclusion that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

HOLCOMB, C. J., BRIDGES, and PARKER, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 15320. Department One. August 7, 1919.]

FIRST NATIONAL BANK OF EVERETT, *Respondent*, v.
NORTHWEST MOTOR COMPANY, *Appellant*.¹

CHATTEL MORTGAGES (60)—TRANSFER OF PROPERTY—LIABILITY OF PURCHASER SUBJECT TO MORTGAGE. Where an automobile was sold subject to a chattel mortgage, the purchaser took no greater rights than the mortgagor had, and is not in a position to deny the validity of the mortgage notwithstanding it was not recorded within thirty days in the county to which the automobile had been removed.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 7, 1918, upon findings in favor of the plaintiff, for a money judgment, in an action to foreclose a chattel mortgage. Affirmed.

Kerr & McCord, for appellant.

J. A. Coleman and *S. H. Kellernan*, for respondent.

MAIN, J.—The purpose of this action, as originally instituted, was to foreclose a chattel mortgage upon an automobile. The defendant Powell, who was the mortgagor, defaulted and the cause went to trial against the other defendant, the Northwest Motor Company, a corporation, which claimed to be a purchaser from Powell. At the opening of the trial, it was stipulated

¹Reported in 183 Pac. 81.

that, in the event the evidence showed that plaintiff was entitled to foreclosure but that foreclosure could not be had because the Northwest Motor Company had sold and transferred the car to another party, then and in that event, a money judgment should be rendered. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a money judgment against the Northwest Motor Company, from which it appeals.

The facts may be summarized as follows: The Northwest Motor Company, the appellant, was the general agent for western Washington for the sale of Packard automobiles, with its place of business located in Seattle. Fred M. Powell was a sub-dealer under the Northwest Motor Company, doing business in the city of Everett. In March, 1917, Powell sold to a customer what is referred to as a second series twin six Packard automobile. He took in exchange from the customer a Packard automobile of an earlier series, as a part of the purchase price. It was necessary for Powell to get the new car from the Northwest Motor Company. That company refused to extend him further credit and it was then necessary for him to finance the deal himself. For this purpose, he borrowed money from the First National Bank of Everett, the respondent, and gave a chattel mortgage upon the old car which he had received from the customer as a part payment upon the new one. After mortgaging this car and getting the money, the new car was paid for and delivered by the Northwest Motor Company to Powell or his customer.

The chattel mortgage was duly and regularly filed and recorded as required by law in the office of the county auditor of Snohomish county. The car covered by the mortgage remained in Powell's garage at Everett, in Snohomish county, until some time early in

May, 1917, when it was taken to Seattle and left with the Northwest Motor Company for sale upon Powell's account. The car remained with the Northwest Motor Company until the November following, when it was sold by that company to a third person. The chattel mortgage was not recorded in King county within thirty days after the car had been left with the Northwest Motor Company.

The Northwest Motor Company claims that it purchased the car when it was left with it in May and that title then passed. The respondent claims that title did not pass in May but that in November, just prior to the sale of the car by the appellant, it was transferred to the Northwest Motor Company by Powell, subject to an existing mortgage of \$1,775, held by the First National Bank of Everett. The pivotal question in the case is whether the contentions of the appellant or those of respondent are sustained by the evidence.

It may be admitted, for the purposes of this decision, that, if the sale occurred in May, the Northwest Motor Company acquired a good title because the mortgage was not filed or recorded in King county within the thirty days specified in the statute. On the other hand, if no title then passed, but a sale occurred in November and was made subject to the mortgage held by the respondent, then the judgment of the trial court should be sustained.

Upon conflicting evidence, the trial court found the facts to be in accordance with the contentions of the respondent. A careful reading of the evidence leads us to the conclusion that the findings of the trial court are clearly right. If the property was transferred subject to the mortgage, as the trial court found and as we also find, then the appellant took no greater rights than the mortgagor had and it is not in a position to deny the validity of respondent's mortgage. 11 C. J.

651; *Nation v. Planters' & Mechanics' Bank*, 29 Okl. 819, 119 Pac. 977; *Howard v. Chase*, 104 Mass. 249.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15272. Department Two. August 8, 1919.]

HEDWIG SWANSON, *Respondent*, v. O. A. STUBB *et al.*,
Appellants.¹

APPEAL (289)—RECORD—STATEMENT OF FACTS—SERVICE OF COPY—NECESSITY. Under Rem. Code, §§ 389, 393, the failure to serve a statement of facts until after the expiration of the time limited is fatal to its consideration.

SAME (289). Under Rem. Code, § 1730-8, an appellant failing to serve a statement of facts within the time limited, must apply to the supreme court for leave to supply the same, upon a showing that such failure was excusable.

LANDLORD AND TENANT (147)—UNLAWFUL DETAINER—DOUBLE DAMAGES. In an action of unlawful detainer of leased premises, judgment upon verdict for the plaintiff should be for double damages, regardless of whether or not the verdict was founded upon nonpayment of rent.

Appeal from a judgment of the superior court for King county, Allen, J., entered November 20, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for unlawful detainer. Affirmed.

Flick & Paul, for appellants.

Leopold M. Stern, for respondent.

FULLETON, J.—This is an appeal from a judgment in an action for unlawful detainer, founded on the verdict of a jury finding in favor of the plaintiff and assessing her damages in the sum of \$300. The judgment was for twice the amount found to be due by the jury.

¹Reported in 183 Pac. 91.

Aug. 1919]

Opinion Per FULLESTON, J.

The respondent moved to strike the statement of facts for the reasons, (1) that the proposed statement was not served upon the respondent; (2) that no written notice of the filing of the proposed statement was served on the respondent; and (3) that the statement of facts was settled and certified by the trial judge in the absence of the respondent, without previous notice of the filing thereof, and without previous notice of the application to settle and certify the statement, and after the appellants' brief and abstract of record on appeal had been served.

The facts upon which the motion is based are, in substance, these: Judgment in the cause was entered on November 20, 1918. The notice of appeal was served and the bond on appeal was filed December 7, 1918. On January 17, 1919, the appellants applied for and obtained an extension of time in which to file and serve a statement of facts, the time being extended to January 28, 1919. The statement of facts was filed on January 27, 1919. No service of the statement was made upon the respondent, nor was she served with notice of the filing thereof. On March 25, 1919, and without notice to the respondent, the statement was certified by the trial judge. On the next day, a copy of the statement was left at the office of the respondent's attorney, and two days later the original statement was filed in this court.

On March 28, 1919, the respondent moved in this court to strike the statement of facts and dismiss the appeal. On the application of the appellants to supplement the record, the motion was denied with leave to respondent to renew it at the hearing on the merits. After the denial of the motion, the appellants served upon the respondent a notice to the effect that they would apply to the trial court on a day named for a "re-certification and re-settlement" of the statement

of facts, at which time the respondent would be at liberty to present any amendments thereto that she might desire. The court at the hearing refused to make a further certificate, deeming itself without power unless directed so to do by this court. At the hearing upon the merits, the respondent renewed her motion to strike the statement.

As the statute relating to the filing and service of proposed statements of fact (Rem. Code, §§ 389, 393) stood prior to the amendatory statute of 1915 (Id., § 1730-8) unquestionably the motion is well taken. That statute required that the proposed statement must be filed with the clerk and served on the adverse party within thirty days after the time begins to run in which an appeal may be taken, with the proviso that the time of filing and service might be extended before or after its expiration by the trial court on stipulation of the parties, or for good cause shown, but not for more than sixty days additional in all. Here, as will appear from the dates before given, the statement was filed within the additional period allowed by the statute, but was not served on the respondent, who in this instance is the adverse party, until long after the expiration of such period. This, as we have repeatedly held, is fatal to its consideration.

The remaining question is whether the omission has been cured in virtue of the amendatory statute by the subsequent proceedings. That statute reads as follows:

“Sec. 1730-8.—In case of a failure of the appellant to serve an abstract of record and statement of facts, or the one served is insufficient, the supreme court shall, if such failure is found to be excusable, allow the appellant a reasonable time, upon such terms as the court may impose, in which to supply such abstract of record and statement of facts.”

Aug. 1919]

Opinion Per FULLETON, J.

It is plain, we think, that before relief can be had under this statute from a failure to comply with the original statutes, the delinquent appellant must make an application to this court for leave to supply the record, accompanying his application with a showing of excuse, and obtain an order from this court granting him leave so to do, which order may be made with or without terms. The appellant cannot, after time and without leave of this court, supply the record, and then claim relief under the statute. Such a procedure would in this instance deny the respondent the benefit of the statute; she would be denied the right to question the sufficiency of the excuse offered, or the benefit of terms, could she show that she was entitled to terms. There was here no compliance or pretense of compliance with these conditions. There was neither an application to this court for leave to supply the defects in the record, nor was there an order of this court granting leave so to do. It follows that the statement of facts must be stricken.

The errors assigned with one exception are based upon matters shown in the statement of facts. Since we conclude that the statement is not before us, these, of course, cannot be considered. The exception noted is the contention that the court erred in entering judgment for twice the amount of the damages returned by the jury. It is argued that the statute (Rem. Code, § 827) permits such doubling only in cases where the verdict of the jury is founded on nonpayment of rent. But the question does not require discussion. It was met and determined by this court contrary to this contention in the case of *Hinckley v. Casey*, 45 Wash. 430, 88 Pac. 753.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, and MOUNT, JJ., concur.

[No. 15280. Department One. August 8, 1919.]

A. A. EVANS et al., as Evans Investment Company,
Respondents, v. GEORGE H. RUBLEE et al.,
*Appellants.*¹

BROKERS (13) — COMPENSATION — PERFORMANCE OF CONTRACT — "SALES PRICE" — FAILURE TO COMPLETE SALE. A broker negotiating a sale of chattels for a commission of five per cent of the "sale price" is entitled to his commission, although the sale was not consummated, where the seller refused to carry out the sale on the terms agreed to.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 4, 1919, upon findings in favor of the plaintiffs, in an action on contract. Affirmed.

James W. Reynolds, for appellants.

Nelson R. Anderson, for respondents.

MAIN, J.—The purpose of this action was to recover a broker's commission claimed to have been earned in negotiating the sale of certain household goods, furniture and furnishings owned by the defendants. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and judgment sustaining the plaintiffs' right to recover. From this judgment the defendants appeal.

The statement of facts having heretofore been stricken, the only question which can now be considered is whether the findings support the judgment. To present the question wherein it is claimed the findings are defective, it is only necessary to briefly state the facts found.

The respondents are copartners in the brokerage business and, at the instance and request of the appel-

¹Reported in 153 Pac. 83.

Aug. 1919]

Opinion Per MAIN, J.

lants, undertook to sell the household goods, furniture, and furnishings of a certain apartment house, known as the Avalon Apartments, in the city of Seattle, the appellants being the owners of the chattels mentioned. The respondents found and produced a purchaser for the chattels and entered into a contract for their sale, which contract was approved and ratified by the appellants. The purchaser was, at all times since the making of the agreement, ready, able and willing to consummate the sale and pay the purchase price as specified in the contract. After the contract was made, the appellants failed and refused to consummate the sale, giving as a reason therefor that they would not sell because they believed they could secure a better price. The appellants had agreed to pay the respondents a commission of "five per cent of the sale price" of the property listed for sale. The appellants refused to pay the commission, and the present action was brought for its recovery.

The appellants contend that the findings do not support the judgment because no sale was consummated. They construe "sale price" as used in the findings, to mean a consummated sale even though the failure to complete the sale may have been due to the fault of appellants. The general rule, as stated in 4 Ruling Case Law, p. 310, § 50, is that,

"The authorities are practically unanimous in holding that unless the broker and his employer have expressly stipulated to the contrary the broker is entitled to his compensation upon the completion of the negotiations he undertook irrespective of whether or not the contract negotiated is ever actually consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker."

The facts, as found in this case, do not show that it had been expressly stipulated that the broker was not

entitled to his compensation unless the contract of sale was actually consummated. It is expressly found that the failure to consummate the contract was due to the appellants. Under the rule stated, sale price, as used in the findings, cannot be construed to mean a consummated sale. It is expressly found that the respondents found and produced a purchaser who was ready, able and willing to pay the purchase price and fulfill the agreement and that the appellants ratified the contract. Under such facts, the respondents were entitled to their compensation. But if it be conceded that "sale price" be susceptible of two constructions, that meaning will be given which supports the judgment rather than one which would defeat it. *Burleigh v. Consumers Publishing Co.*, 95 Wash. 49, 163 Pac. 5.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15284. Department One. August 8, 1919.]

B. F. WILLIAMSON *et al.*, Respondents, v. DAISY P. HALLETT, Appellant.¹

LANDLORD AND TENANT (141)—UNLAWFUL DETAINER—COMPLAINT—ALLEGATION AS TO EXISTENCE OF RELATION. In an action of unlawful detainer, a complaint is not demurrable in failing to allege how and under what terms the defendant took possession, in the absence of any motion to make more definite and certain.

SAME (126)—UNLAWFUL DETAINER—STATUTORY PROVISIONS—EXISTENCE OF RELATION. The conventional relation of landlord and tenant to sustain an action of unlawful detainer may be created by implication, and arises where defendant entered without the knowledge of plaintiff, who immediately gave notice to quit or pay rent; especially in view of Rem. Code, § 8805, providing that a person obtaining possession without the owner's consent shall be deemed a tenant by sufferance and liable for reasonable rent.

¹Reported in 182 Pac. 940.

Aug. 1919]

Opinion Per TOLMAN, J.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered September 7, 1918, upon findings in favor of the plaintiffs, in an action of unlawful detainer. Affirmed.

W. C. Donovan and *Geo. H. Armitage*, for appellant.
F. E. Langford, for respondents.

TOLMAN, J.—The facts in this case are sharply disputed in many respects; but after a careful examination of the evidence, we are satisfied that the findings of the trial court are amply supported. The proof justifies the following statement.

On and prior to May 10, 1918, respondents were the lessees from one Whitten, the owner, of the premises in controversy, and were in possession through their tenant, one Cleo DeMar, who operated the property as a lodging house or hotel. The furniture in the hotel was held by DeMar under a conditional sale agreement in which appellant was the grantor. Default having been made in the payments, appellant claimed a forfeiture of DeMar's rights under the conditional sale agreement, and took possession of the furniture and the hotel on or about May 10, 1918. Respondents had no previous knowledge of this taking of possession, and no express contract was made at any time by them with appellant as to her occupancy of the premises, or as to the payment of rent therefor. Finding appellant in possession about the 10th of May, respondents demanded rent from her, and renewed the demand on several occasions thereafter without success, and finally, on June 20, 1918, they caused a three day notice, in the alternative to pay rent or surrender the premises, to be served upon her. This being uncomplished with, this action was brought under the forcible entry and detainer statute.

Appellant complains first of the overruling of the demurrer to the complaint, because it does not plead that the conventional relationship of landlord and tenant existed between the parties. The complaint alleges ownership and right of possession in respondents; that, on May 10, 1918, appellant entered into possession and has ever since occupied the premises; the reasonable rental value; the failure to pay the same or any part thereof; the service of the notice in the alternative and the failure to comply with such notice. The only deficiency (if it can be so called) in the complaint, which is pointed out or which we have discovered, is the failure to plead how and under what terms the appellant took possession. But in the absence of a motion to make definite and certain, according to our view of the law as hereinafter expressed, appellant could not be heard to complain, and we think the demurrer was properly overruled.

Appellant argues that, to warrant a recovery in an action of this kind, the conventional relation of landlord and tenant is indispensable and must be clearly established. Conceding this to be the law, it does not follow that such a relationship can be created only by express agreement between the parties. *Sheridan v. Doherty*, 106 Wash. 561, 181 Pac 16. There may be and frequently is an implied contract which just as certainly creates the conventional relationship.

“The relation of landlord and tenant may be created by implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other; for in such cases it will be presumed that the occupant intended to pay for the use of the premises. It will be implied, in many cases, where there has been no distinct agreement between the parties, or where, from various

Aug. 1919]

Opinion Per **TOLMAN, J.**

causes, the agreement may have ceased to be operative." 1 Taylor, *Landlord and Tenant* (9th ed.) § 19.

So here, as found by the trial court and established by the testimony, as we read it, although appellant entered without the knowledge or express permission of respondents, yet they immediately gave their permission by demanding the rent; and the notice to quit or pay rent in itself shows permission on their part. While we are convinced that, from the facts shown, the law will imply a tenancy and an agreement to pay rent, yet if there was no permission, the legislature has put the question at rest in this state by statute, Rem. Code, § 8805, which reads:

"Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand."

The defense urged and mainly relied upon in the trial court was that the appellant was never in possession at all; and the evidence being such as to settle that question contrary to her contentions, the judgment is affirmed.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15309. Department One. August 8, 1919.]

CHARLES BONO *et al.*, *Appellants*, v. GEORGE WARNER,
Respondent.¹

LANDLORD AND TENANT (12-1)—LEASE—MODIFICATION—QUESTION FOR JURY. In a landlord's action for damages for the tenant's failure to summer-fallow half of the land each year, whether the lease was modified by an agreement was for the jury, where the defendant testified that the cropping of the east half two years in succession was with plaintiffs' consent and approval.

Appeal by plaintiffs from a judgment of the superior court for Walla Walla county, Mills, J., entered April 5, 1918, in favor of the plaintiffs for the sum of \$515, upon setting aside a special finding of a jury in favor of the defendant. Affirmed.

John C. Hurspool, for appellants.

Rader & Barker, for respondent.

MAIN, J.—By this action the plaintiffs, the owners of certain farm land, sought to recover damages from the defendant, the tenant, for failure to till the land in accordance with the terms of the lease contract. In the defendant's answer, there were a number of affirmative defenses pleaded in the nature of counterclaims. One of these affirmative defenses claims \$500 for money advanced for the purchase of forty acres of land, not covered by the lease, for and on behalf of the plaintiffs. The cause was tried to the court and a jury. The jury answered three special interrogatories submitted to them. The answer to one of the interrogatories was to the effect that the defendant had purchased the forty acres of land referred to and paid the sum of \$500 therefor, for and on behalf of the plaintiffs. A general verdict in the sum of \$15 was

¹Reported in 182 Pac. 946.

rendered in favor of the plaintiffs. The plaintiffs moved for a new trial on various grounds, and also for an order vacating and setting aside the special finding against the plaintiffs for \$500 on account of the purchase of the forty acres of land. The court required the defendant to consent to the setting aside of the special verdict and the entry of a judgment for \$515, otherwise a new trial would be granted. This was on the ground that there was no evidence to sustain the special finding. The defendant made the election required and judgment was entered in favor of the plaintiffs in the sum of \$515. From this judgment, the plaintiffs appeal.

The appellants were the owners of a tract of land in Walla Walla county consisting of approximately seven hundred acres, about six hundred of which were or could be cultivated. Under the lease by which the respondent was occupying the land, it was to be devoted to wheat raising. The lease provided that approximately half of the tillable land should be summer-fallowed during the year 1915 and a crop produced thereon in the following year, and that the other half should be summer-fallowed in 1916, for a crop in 1917, and so on thereafter during the term of the lease. By summer-fallowing was meant so treating the land that it would be in proper condition for seeding and the production of a crop the following year. The respondent went into possession in the year 1915, and produced a crop on what is referred to as the east half of the land during the year 1916. During the latter year, he did not summer-fallow the other or what is referred to as the west half. Neither did he do any summer-fallowing the succeeding year.

The action was brought to recover damages for the failure to summer-fallow as required by the lease. The jury, in a special finding, awarded damages in a

substantial amount for the year 1918, and this was embodied in the judgment. The controversy here is over the failure of the jury to award damages for the year 1917. During that year, as already pointed out, the west half, not being in crop, should have been summer-fallowed, but this was not done. The defendant in his answer pleaded that, by agreement of the parties, the portion of the land which had been cropped in 1916 was prepared for a crop the succeeding year; in other words, that, by agreement of the parties, the east half was to be cropped two years in succession. The appellants claim that no such agreement was made. This question, if there was substantial evidence to support the respective contentions, was one for the jury, under proper instructions by the court. One of the errors claimed is that the court refused to give the appellants' requested instructions upon this matter. In the instructions given, however, the question is covered, and we think sufficiently. The question whether the east half was farmed two years in succession by agreement of the parties was, by the instructions given, submitted to the jury. Whether there was evidence that was undisputed, if there had been no such agreement, which would sustain a substantial verdict and judgment, it does not seem necessary here to inquire.

There was much evidence by the respective parties upon the character of the land referred to as the west half, which was not summer-fallowed, and the probabilities of the kind of a crop that might have been produced thereon had the same been summer-fallowed and seeded. But it is unnecessary to pursue this question. If there was evidence that there had been a modification of the lease by agreement, the respondent would not be liable for the failure to summer-fallow and seed the west half, as required by the lease. It is

Aug. 1919]

Statement of Case.

argued that the evidence shows there was no waiver or modification of the terms of the lease. The defendant testified that the discing of the east half during the fall of the year 1916 which had produced a crop that year, and seeding it the next succeeding year was with the consent and approval of the appellants or their authorized agent. It seems to us that the question whether there was a modification was one for the jury.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15395. Department One. August 9, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Pioneer Mining & Ditch Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

GARNISHMENT (1) — NATURE — TERMINATION. A garnishment is merely an ancillary proceeding which immediately dies on termination of the original action.

APPEAL (232) — SUPERSEDEAS — RIGHT TO DISMISSAL — GARNISHMENT. Upon appeal from the dismissal of the original action in which a garnishment has sequestered funds, the plaintiff is entitled to an order fixing the amount of the supersedeas bond on appeal, in order to maintain the *status quo* and make available the money sequestered by the garnishment.

Application filed in the supreme court June 2, 1919, for a writ of mandamus to compel the superior court for King county, Frater, J., to fix the amount of a supersedeas bond on appeal. Granted.

Edward H. Chavelle and Williamson, Williamson & Freeman, for relator.

Edward Judd and O. L. Willett, for respondent.

¹Reported in 183 Pac. 74.

TOLMAN, J.—Relator brought suit in the superior court for King county to recover from one J. M. Davidson a sum of money paid in satisfaction of certain indebtedness for which it was alleged Davidson was liable over by reason of certain guarantees made by him and others. At the time suit was commenced, a writ of garnishment was duly issued, directed to J. E. Chilberg, who answered admitting an indebtedness to Davidson of upwards of \$15,000. Subsequent to the filing of the garnishee's answer and pursuant to supplemental proceedings had in another cause, then pending in the same court but heard in a different department, Chilberg was required to pay the money which his answer admitted to be due to the sheriff of King county, who supposedly is holding the fund awaiting the termination of the garnishment proceedings.

Relator's case against Davidson came on for trial with matters in this condition, and after a jury had been impaneled and sworn and plaintiff's evidence offered, the defendant Davidson interposed a motion for a nonsuit, which the trial court orally granted. Relator immediately, and in open court, applied to the trial judge for an order fixing the amount of a supersedeas and stay bond for the purpose of retaining in *status quo* the money sequestered by the garnishment proceedings, pending an appeal to this court from the judgment of nonsuit. The trial judge having declined to fix any supersedeas bond, application is now made to this court for a writ of mandate requiring him to do so.

A garnishment proceeding can be commenced only when an original attachment has been issued, when plaintiff sues for a debt and makes the required affidavit and gives bond, or when plaintiff has a judgment wholly or partially unsatisfied. Rem. Code, §§ 680,

681. So that a garnishment proceeding is in no sense an original or independent action, but is ancillary to the original cause from and through which its existence comes. *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478. And with the dismissal or termination of the original action in favor of the defendant therein, the garnishment proceeding must immediately die. The statute recognizes this fact by the proviso in Rem. Code, § 693, to the effect, that, if judgment be rendered in favor of the original defendant, the garnishee shall not be required to pay, nor shall any judgment be rendered against him; and by the provisions of § 695, to the effect that, if judgment be rendered in favor of the original defendant in the original cause, any personal property or effects which the garnishee defendant may have previously delivered to the sheriff shall be returned to him.

If, then, the trial court enters a judgment in the original cause in favor of the original defendant, without at the same time fixing the amount of a supersedeas bond sufficient to save the respondent harmless from damages by reason of the appeal, as prescribed by Rem. Code, § 1722, then the plaintiff is powerless by any means to retain the fund which may have been sequestered by garnishment in a situation where it will be available to him in the event that his appeal is successful; but under the plain letter of the statute, in such a case as this, the sheriff may and must return the fund to the garnishee; and in any such case, the judgment in favor of the original defendant not being superseded, the garnishee defendant might, it would seem, at once pay over the fund to his creditor, and thereafter plead such judgment as his justification, notwithstanding its subsequent reversal.

That the plaintiff in the original action may appeal from a judgment in favor of the defendant is, of

course, not denied; and if so, that he may stay or supersede that judgment so as to reap the fruits of a successful appeal would seem to follow, under our statute as construed by this court, if the loss or damage suffered by the delay may be met by a money award. The subject of what judgments may or may not be superseded is fully discussed in *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916, and the cases bearing upon the subject are collated and classified so fully and logically that it seems unnecessary to go over the subject again. The conclusion there arrived at is:

“From the very nature of the statute (Rem. Code, § 1722), it is implied that the loss or damage suffered by the delay may be met by a money award. Unless the loss can be so met, a stay is not ordinarily granted.”

It follows, therefore, that when the loss or damage suffered by the delay occasioned by the appeal may be met by a money award, a supersedeas should always be granted; and as in this case such loss or damage can be so met, the trial court erred in refusing to fix the amount of a supersedeas bond.

The writ will issue, as prayed for, requiring the judge of the superior court to so act.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur

Aug. 1919]

Opinion Per MOUNT, J.

[No. 15397. Department Two. August 9, 1919.]

*In the Matter of the Estate of GEORGE JISKRA, a
Nonresident Minor.*¹

GUARDIAN AND WARD — AUTHORITY — INVESTMENTS—LIABILITY. A guardian for an insane person is liable for money lost through the failure of a bank where, by a specific order, he was directed to invest the money upon real estate security to be approved by the court, and without such approval he invested it in certificates of deposit of such bank, where it remained until the bank failed; and it was immaterial that the trial judge was orally informed of such investment.

Appeal from a judgment of the superior court for Pacific county, Reynolds, J., entered December 11, 1917, in probate, upon final settlement of a guardian's account, holding the guardian liable for a loss. Affirmed.

John T. Welsh, Fred M. Bond, and John I. O'Phelan,
for appellant.

Herman Murray, for respondent.

MOUNT, J.—On July 25, 1907, Frank Bert was appointed guardian of the estate of George Jiskra and other minors. On the 19th day of December, 1912, upon application of the other minors, who had then arrived at the age of majority, the court entered an order requiring the estate of the other minors to be delivered to them, and on that date found that the amount due George Jiskra was six hundred forty-nine dollars and sixty-five cents (\$649.65), and entered an order continuing Mr. Bert as guardian of George Jiskra and providing for the investment of the money belonging to the minor as follows:

“That the balance, to wit: \$649.65, be invested as follows, be put out at interest, with good and sufficient

¹Reported in 182 Pac. 961.

security, security to consist of real estate mortgage on property worth not less than \$1,000, of which the title shall be perfect, the rate of interest not to be less than six per centum per annum. The payment of both principal and interest to be secured by said mortgage. The security, before being accepted by said guardian to be approved by this court."

Then, further along in the same order, it is provided as follows:

"It is hereby further ordered that the balance remaining in said estate after the payment of said sums, to wit: the sum of \$649.65, to be invested in interest bearing securities, under the order of this court at a rate of interest not less than six per centum per annum; the payment of both the principal and interest to be secured by securities to be approved by this court."

Thereafter the guardian invested this money in certificates of deposit of the First International Bank of South Bend, Washington, bearing upon their face four per cent interest, but in order to make them bear six per cent interest the difference was credited upon the principal at the time of the deposit. This money remained in the bank until July 19, 1915, when the bank failed. When the minor became of age, the guardian made his final report showing that the sum deposited in the bank had been lost by reason of the failure of the bank, and asked to have that amount credited upon the final account. Objection was filed to the final account, trial was had thereon, and the court concluded that the loss should fall upon the guardian and not upon the ward. The guardian has appealed from that order.

Appellant argues, in substance, that, because he acted in good faith, and because the money was deposited in a bank of good repute, he ought not to be held liable for the loss.

Aug. 1919]

Opinion Per MOUNT, J.

When the distributive share of the estate of this ward was placed in the hands of the guardian, it was placed there under a specific order of the court directing the manner in which it should be invested, namely, to be secured by real estate mortgage on property worth not less than one thousand dollars. It is true, a subsequent part of the same order provided that the money should be invested in interest-bearing securities under the order of this court at a rate of interest not less than six per cent per annum, the payment of both principal and interest to be secured by securities to be approved by the court. This part of the order did not change the order specifically defining the kind of security. So far as the record shows, this investment by the guardian was never approved by the court; and we are satisfied that, when the court made an order directing the guardian to invest the money in certain kinds of securities, and in violation of that order the guardian invested the money in other securities, he took his chances and the loss must therefore fall upon him and not upon the ward. There was some evidence introduced at the trial by the judge who made the order that he was informed by the guardian of the investment in certificates of deposit in the bank; and appellant now argues that a *nunc pro tunc* order should be entered authorizing the investment in these certificates of deposit. But we think it is plain that a conversation of the judge of the court with the guardian did not have the effect of modifying the order of the court originally made. The order as originally made was a signed order entered on the journal, and if the guardian desired to invest the money in some other securities, it was his duty to have the order modified by a subsequent order of the court entered with the usual formalities. It will not do to say that a talk or conversation of a judge of the court may be considered

as an order and entered *nunc pro tunc*, as is here requested.

We are satisfied the trial court properly placed the loss upon the guardian, and the judgment is therefore affirmed.

HOLCOMB, C. J., FULLERTON, PARKER, and BRIDGES, JJ., concur.

[No. 15228. Department Two. August 9, 1919.]

In the Matter of the Estate of JOSEF JISKRA, Insane.

MINNIE ELLIS *et al.*, Appellants, v. FRANK BERT,
*as Guardian etc., Respondent.*¹

GUARDIAN AND WARD—INVESTMENTS—LIABILITY. Where a guardian for an insane person was ordered to invest moneys collected for the current year in certificates of deposit of a certain bank, which was a bank of good repute, and the next year was ordered to invest collections in certificates of deposit without specifying the bank, he was justified in considering the order as a continuing one and in investing the funds in the same bank, and is not liable for the loss of the funds through failure of the bank.

SAME (30)—ACCOUNTING—COMPENSATION. Upon allowing the final account of a guardian, an allowance of \$25 attorney's fees and \$25 as a fee for the guardian was proper, under Rem. Code, § 1652.

Appeal from a judgment of the superior court for Pacific county, Reynolds, J., entered October 18, 1918, in probate, setting aside the final account of a guardian. Affirmed.

Herman Murray, for appellants.

Fred M. Bond, John T. Welsh, and John I. O'Phelan, for respondent.

MOUNT, J.—This appeal is from a judgment of the superior court settling the final account of the guardian of the estate of Josef Jiskra.

¹Reported in 182 Pac. 959.

Aug. 1919]

Opinion Per MOUNT, J.

It appears that Josef Jiskra at one time was a resident of Pacific county, in this state, and that he acquired title to certain real estate in that county. He was afterwards adjudged insane, and letters of guardianship were issued to Frank Bert on the estate of the insane person in Pacific county. Thereafter the real estate was sold for four thousand dollars and the proceeds thereof were reported in the annual account made by the guardian in the year 1910. The proceeds of the sale, after deducting the expenses and certain fees, were invested in a real estate mortgage. In the year 1911, the guardian made an annual report stating that he had on hand the sum of one hundred forty-nine dollars and eighty-nine cents (\$149.89), the proceeds of the real estate mortgage. Upon the hearing of that report, the court made an order as follows:

"That there is on hand in said estate the sum of \$149.89, and that the same should be invested so as to be revenue producing and that said sum of \$149.89 should be invested by said guardian as follows, to wit:

"In a certificate of deposit in First International Bank of South Bend, to draw interest at a rate of not less than 4 per cent per annum."

This order was made on the 19th day of May, 1911. Thereupon the guardian invested the money in a certificate of that bank. In the following year, 1912, the guardian made a report that since his last report he had collected interest on the real estate mortgage in the sum of one hundred fifty-five dollars and seventy cents (\$155.70), and on the certificate of deposit, five dollars and seventy-three cents (\$5.73). Upon a hearing of that report, the court made an order as follows:

"It is hereby ordered that the balance remaining, to wit: the sum of \$237.28, be invested in certificates of deposit drawing interest at a rate of not less than 4 per cent per annum."

This money was thereupon invested in certificates of deposit in the First International Bank of South Bend, where the guardian already had on deposit certain moneys belonging to the estate.

No report was thereafter made until the year 1917. In the meantime, the guardian had collected interest on the real estate mortgage and deposited the same in certificates in the same bank until he had on hand seven hundred thirty-five dollars (\$735). The bank failed in the year 1915, and when the guardian made his final report in the year 1917 he asked for credit of seven hundred thirty-five dollars (\$735) upon his account. Objections were filed to this final account, and upon a hearing before the court, the court found that the guardian should be charged with one thousand dollars and ninety-eight cents (\$1,000.98), and that he should be allowed a credit of seven hundred thirty-five dollars (\$735) against that sum on account of the failure of the First International Bank of South Bend. The heirs of the estate have appealed from that judgment.

Several assignments of error are alleged, but the principal question in the case, and the only one which we find necessary to discuss, is whether the court erred in allowing the credit of seven hundred thirty-five dollars (\$735) on account of the funds lost by the failure of the First International Bank of South Bend. It will be observed that the court, upon the annual report of the guardian in the year 1911, ordered that the moneys collected by the guardian for the year 1910 should be invested by the guardian in a certificate of deposit "in First International Bank of South Bend, to draw interest at a rate of not less than 4 per cent per annum." In the year 1912, a similar order was made, but the name of the bank was not mentioned.

Aug. 1919]

Opinion Per MOUNT, J.

Thereafter no report of the guardian was made to the court, but the guardian continued to deposit the money of the estate in the same bank and in the same way. We think it is plain from this record that the guardian was authorized by the court by formal order to invest the proceeds of the estate in these certificates of deposit in this particular bank. The evidence shows that, at the time the deposits were made in this bank, the bank was recognized as being a solvent institution. No notice was brought home to the guardian that the bank was not solvent until about the time of its failure. The rule is stated in *In re Kohler's Estate*, 15 Wash. 613, 47 Pac. 30, 55 Am. St. 904, as follows:

“The uniform holding of courts has been that executors, administrators and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee, and where such a one in good faith deposits money in a bank of good repute to the trust account, he ought not to be held liable for its loss in consequence of the failure of the bank.”

A number of authorities are there cited to support the rule. The guardian in this case deposited the money received by him in the bank in good faith and to the trust account; and clearly, therefore, he was entitled to have credit for the amount of money so deposited. In addition to that rule, the guardian here had obtained an order of the court and the order was made an order of record to the effect that he should deposit the money received by him in this particular bank. This order was no doubt made upon sufficient evidence, and the court, after hearing the evidence, no doubt concluded that the bank was a safe one in which the money might be deposited, and therefore made the order. Aside from the general rule which we have

quoted above, we are of the opinion that the orders of the court above referred to were sufficient for the guardian to act upon, and that it was not necessary for him at each time he received money to obtain a special order of the court for depositing the money in that particular bank. We think he was justified in assuming that the order was a continuing one and that he would be authorized to make the deposit, especially in view of the fact that the bank at that time was regarded as in sound financial condition.

The court in making the order upon the final account allowed an attorney's fee of twenty-five dollars (\$25) to counsel for the guardian, and also allowed the guardian twenty-five dollars (\$25) fee upon the final account. Some objection is made to this part of the order, but we are satisfied that the court properly made these allowances. Rem. Code, § 1652.

We find no error in the record and the judgment is therefore affirmed.

HOLCOMB, C. J., FULLERTON, PARKER, and BRIDGES, JJ., concur.

Aug. 1919]

Opinion Per FULLERTON, J.

[No. 15344. Department Two. August 9, 1919.]

G. W. HARRIS, *Appellant*, v. R. L. SAUNDERS, *Respondent*, E. E. GERLINGER, *Defendant*.¹

TRIAL (60)—PROVINCE OF COURT AND JURY—DIRECTION OF VERDICT. In an action at law tried to the jury, the court may sustain a challenge to the sufficiency of the evidence only where there was no substantial evidence tending to support the material issues.

FRAUD (25)—ACTIONS FOR DAMAGES—QUESTION FOR JURY. There is sufficient evidence that the purchase of stock in a corporation was induced by the fraudulent representations of the defendant, an officer and director of the company, where it was represented that the company was solvent, was doing a profitable business, had paid dividends, and that the stock had been issued for value received, all of which was false, the company being insolvent and its stock of no value.

FRAUD (22)—EVIDENCE OF DAMAGE—SUFFICIENCY. There was sufficient evidence of damage, through fraud in the sale of stock, in that the stock was of no value, where the company had shortly before pledged all its property for a debt, soon became insolvent, and had no prospect of paying over twenty cents on the dollar.

DEPOSITIONS (10)—ADMISSIBILITY OF PART. The adverse party may offer in evidence portions of a deposition where the same relates to a transaction separate from the other transactions stated in the deposition.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 28, 1918, upon the verdict of a jury rendered in favor of the defendant, by direction of the court, in an action for fraud. Reversed.

S. H. Kellerman and *E. E. Hess*, for appellant.

Earle & Steinert and *C. H. Winders*, for respondent.

FULLERTON, J.—In this action the appellant Harris seeks to recover from the respondent Saunders and the defendant Gerlinger the sum of \$3,200, paid by

¹Reported in 182 Pac. 949.

him for shares of the capital stock of a corporation known as the Gerlinger Motor Car Company.

In his complaint, the appellant charges that the persons named conspired together to induce him to purchase the stock by falsely representing the business condition and the financial condition of the corporation named. He charges that they represented to him that the corporation was engaged in the manufacture of a truck called by the trade name of "Gersix"; that the truck had been thoroughly tested; that it had an established reputation; had proven satisfactory to the trade; and that the output of the factory was meeting with a ready sale. He further charged that the defendants represented that they were officers and stockholders of the corporation and had paid to the corporation the par value of their stockholdings in cash; that they were familiar with the financial condition of the corporation; that it was absolutely and completely solvent and in a flourishing condition; and that, during the two years immediately preceding, it had paid annual dividends to its stockholders of twelve per cent; and promised that, if he bought capital stock of the corporation and within ninety days became dissatisfied, they would refund to him the money invested; and that, to give their promise the semblance of good faith, they caused a similar promise in writing to be made by the corporation, although they well knew that such a promise could not be enforced in law. He further charges that, relying on the good faith of the representations, he invested \$3,500 in the capital stock of the corporation and received the written promise of the corporation to refund the money invested within ninety days in case he should become dissatisfied with his investment. He then charges the falsity of the representations, averring specifically that the truck the corporation was engaged in manufacturing was

Aug. 1919]

Opinion Per FULLERTON, J.

not a product of established reputation, and had not proven satisfactory to the trade; that the corporation was not then in a flourishing condition nor solvent, but was in fact insolvent; that it had not paid twelve per cent dividends on its capital stock annually during the preceding two years, nor any dividends thereon, and that the respondent Saunders, instead of paying cash at the par value for his stock, did not pay anything for such stock. He further alleged that he discovered the falsity of the representations within the ninety-day period, and made demand for the return of the money invested; that three hundred dollars thereof, and no more, had been returned to him; that the corporation had been adjudged insolvent, and at the time of the filing of the complaint was in the hands of a receiver.

The defendant Saunders answered separately. He denied generally all of the allegations of the complaint, save the allegations that the appellant purchased certain of the capital stock of the corporation named; that the corporation had given its obligation to repurchase the stock at the end of ninety days; that the corporation was then in the hands of a receiver and that but \$300 of the appellant's investment had been returned to him. The defendant Gerlinger also appeared and answered, but prior to the trial withdrew his appearance and default was entered against him.

On the issues framed, a trial was entered upon by the court, sitting with a jury. At the conclusion of the appellant's evidence, a challenge to its sufficiency was interposed by the respondent and sustained by the court. The court thereupon charged the jury to return a verdict in favor of the respondent Saunders and against the defendant Gerlinger. This was done and a judgment entered accordingly. This appeal is from

that part of the judgment in favor of the respondent Saunders.

The appellant's assignments of error question the correctness of the order of the trial judge sustaining the challenge to the sufficiency of the evidence. In determining the question, it must be kept in mind that the judge was not the trier of the facts. The complaint stated a cause of action, and the appellant was entitled to recover if his evidence proved the substance of his cause of action. The action was one of legal cognizance, being tried by the jury as such. The trial judge, therefore, was warranted in sustaining a challenge to the sufficiency of the evidence only if there was no substantial evidence on the part of the appellant tending to support the material issues. Disputes in the evidence, and disputed inferences arising from the evidence, were for the jury to determine, not the trial judge. It must be remembered, also, that, in passing upon this question, the appellant was entitled to have considered, where the evidence is contradictory, or where favorable or unfavorable inferences can be drawn from the evidence, that part of the evidence most favorable to his contention. It is not the rule that a litigant is bound by the unfavorable testimony of a witness, even though that witness may be one he himself produces; that is to say, if a plaintiff produces evidence tending to support his allegations and then introduces a witness who contradicts his former evidence, he may still go to the jury on the question, as the contrary rule would always place him at the mercy of a designing witness.

The testimony as we view it, tested in the light of the foregoing principles, warranted the jury in finding the following facts: The Gerlinger Motor Car Company was an Oregon corporation, organized in 1910, with a capital stock of \$50,000. The stock was issued

Aug. 1919]

Opinion Per FULLESTON, J.

principally to the defendant Gerlinger, who, so far as appears from the books of the corporation, gave no consideration therefor. The corporation first began business at Portland, Oregon, selling motor passenger cars and motor trucks of other manufacture. In 1913 or earlier, it opened a branch business at Seattle, Washington, of which the respondent Saunders was later appointed local manager, receiving for his services a small salary and commissions on the motor cars and trucks sold by him. After he had been manager for some months, he was presented by Gerlinger with shares of the capital stock of the corporation of the par value of \$500, and shortly thereafter elected a trustee and vice president of the corporation. In the early part of 1916, he was given by Gerlinger additional stock of the par value of \$4,500, making his holdings \$5,000. This stock was given him to induce him to remain with the corporation, whose services he then contemplated leaving.

The corporation had manufactured a few trucks at Portland, which it called the Gersix truck; and in March or April of 1916, opened a factory at Tacoma, Washington, to enter into their manufacture on a more extensive scale. At this time the capital stock of the corporation was increased from \$50,000 to \$100,000.

The appellant is a civil engineer and draughtsman by profession, and his principal occupation has been along those lines. In July, 1916, being desirous of making an investment in an established business, he inquired of one Algase for such an opportunity, and was referred to the respondent Saunders. He visited Saunders and stated to him his desires and was advised by him to invest in the capital stock of the Gerlinger Motor Car Company. As an inducement for him to purchase, the respondent stated to him that the company was in a flourishing condition and wanted to

expand; that the company was manufacturing a truck known as the Gersix; that it had proved a great success, and that it could not supply the trucks it had a market for; that it had recently established a factory at Tacoma for the manufacture of trucks on a large scale and was anxious to expand its business, being desirous of establishing agencies in the eastern part of the state. He further said that the company had paid twelve per cent dividends on its capital stock annually for the last two years and that, if he invested in the company's stock and was dissatisfied at the end of three months, the stock would be taken off his hands at the price he paid for it. The appellant then left Saunders, saying to him that he would see him later. Later on, he again visited the respondent and expressed a desire to investigate further. At this time the respondent insisted that he make a deposit, whereupon he gave the respondent his check for \$500, payable to the order of the corporation. This check was endorsed by the cashier of the corporation and later cashed. A few days subsequent, the respondent took the appellant to Tacoma in his private car. On the way over, the affairs of the company were again discussed, the respondent telling the appellant that he had \$5,000 in the stock of the company, but did not tell him how he had obtained it. At Tacoma the appellant met Gerlinger for the first time. He was shown over the plant, and the condition of the company was again gone over, Gerlinger repeating in Saunders' presence the representations previously made to him by Saunders. The question of the return of the investment to the appellant was also brought up, whereupon both Gerlinger and the respondent assured him that it would be returned if he was dissatisfied at the end of ninety days, and the written assurance of the corporation to that effect was given him. A few days

Aug. 1919]

Opinion Per FULLETON, J.

later, the appellant, relying, as he testifies, upon these representations, purchased stock of the company at its par value to the amount of \$3,500. At the end of ninety days, he expressed his dissatisfaction to Saunders, and asked for his money back. Saunders urged him to stay with the company. He again repeated his demand from time to time thereafter, but was put off with the promise that the matter would be adjusted. Finally, at his urgent request, Saunders gave him a check for \$300, but nothing more was paid on the demand.

During all these times, Gerlinger was president, manager and a member of the board of trustees of the corporation. Saunders was vice president and a member of the board of trustees. Subsequent thereto, Saunders withdrew from the company, purchasing its interests in the Gersix truck and engaging in its manufacture through another corporation at Seattle.

The evidence showed that the corporation was in straightened circumstances, if not insolvent, at the time the representations recited were made to the appellant. In May, 1916, the corporation borrowed \$10,000 from a bank at Tacoma on the indorsement of Gerlinger and one Outcalt, mortgaging its real and personal property to secure the indorsers. This obligation remained outstanding until after the corporation was adjudged insolvent in June, 1917. The receiver appointed in the bankruptcy proceedings testified that the books of the corporation showed that no dividends had ever been paid on the stock of the corporation, unless what "Gerlinger took out" of the receipts of the corporation might be called a dividend. He further testified that the assets in his hands would not pay to exceed twenty per cent of the indebtedness of the company.

It seems to us clear there was here sufficient evidence that the appellant had been induced to purchase

the stock in question by false representations to make the question one for the jury. There is evidence, also, that the representations were the inducing cause of the purchase of the stock. This being true, the respondent is answerable for the consequences. It is true he was called as a witness by the appellant and in the course of his examination testified that the Seattle branch of the corporation's business was the only branch of which he had knowledge, and that the business of this branch had always been profitable, and that he had no knowledge of the financial condition of the corporation otherwise. But these facts, if accepted as true, will hardly excuse him. He was vice president and a member of the board of trustees of the corporation, and is chargeable as if he had knowledge of its condition. Promoters, officers and directors of corporations, putting forth false statements concerning the condition of their corporation, are as much bound to refrain from stating as true what they do not know to be true, as from stating to be true what they know to be false.

But perhaps the principal contention is that there was no proof of damages. The respondent cites the cases from this court holding that the measure of damages in actions for deceit or breach of warranty, in sales of real or personal property, is the difference between the actual value of the property at the time of the sale and what its value would have been if the representations made had been true, and argues that there is no evidence in the record of the actual value of these shares of stock at the time of appellant's purchase. But it seems to us there was substantial evidence in this respect. It was shown that, just prior to the sale of the stock to the appellant, the corporation was without ready money; that, in order to procure credit, it was compelled to pledge its real and

Aug. 1919]

Opinion Per FULLERTON, J.

personal property to secure a loan; that it met with no sudden reverses carrying unexpected losses; that it never redeemed the property from such pledge and was adjudged insolvent while the obligation was outstanding. Plainly there were facts shown from which the jury could well have found that the stock of the corporation then had no actual value. That a corporation may borrow money to be used in the conduct of its business is, of course, not necessarily evidence of insolvency, nor is the fact that it may pledge its securities for such a loan such evidence, but when it pledges its entire plant for a loan, nominal when compared with its capital stock, and without suffering extraordinary losses, or misfortune of any kind other than its inability to conduct its business successfully, and is adjudged insolvent before it redeems its pledge, the facts are very persuasive of insolvency at the time the pledge was made.

Since the cause must be remanded for trial, another question must be noticed. Prior to the trial, a deposition had been taken on behalf of the defendants. At the trial, the appellant, the adverse party, offered portions of the deposition as evidence in his behalf. Objection was made and sustained to the offer because all of the deposition was not tendered. As to what is the proper rule under such circumstances, the authorities are not uniform. We believe, however, the better rule to be that portions of a deposition may be read in evidence when the portion relates to a transaction separate from and independent of other transactions related in the deposition. All that relates to the particular transaction must be read, but there is no necessity that matters foreign to it be proffered or read. The principal is well stated in the case of *First National Bank of Fargo v. Minneapolis & N. Elevator Co.*,

11 N. D. 280, 91 N. W. 436, where the following language was used:

“Error is also assigned on the court’s ruling denying the defendant the privilege of introducing certain questions and answers which were contained in the deposition of W. E. Ditmer, which had been taken on behalf of the plaintiff and used on a former trial. The record shows that counsel for defendant announced that he intended to read but a portion of the deposition. Counsel for plaintiff objected unless the entire deposition was offered. The abstract shows the following ruling: ‘The court permits counsel to read from such deposition such parts thereof as are relevant, and relate to any distinct transaction or transactions connected with the subject-matter under controversy in this action, and requires him to read all of the evidence pertaining to such transaction; leaving it to the discretion of the other party to offer the remainder of the deposition if he so desires.’ In this ruling we find no error. It is true, the defendant was authorized under the statute to read the deposition in evidence. § 5682, Rev. Codes. But its statutory right did not extend to reading mere excerpts and isolated parts thereof. It is well settled that it is within the discretion of the trial judge to require an entire deposition to be read. The authorities uniformly hold, we believe, that, when a portion of a deposition is permitted to be read relating to a separate transaction, all the evidence that is competent and pertinent to the subject must be introduced. A part of the deposition cannot be read, and a part omitted, at the option of the party offering it. All that is competent and pertinent to the transaction should be read, or none. *Kilbourne v. Jennings*, 40 Iowa, 473; *Bank v. Rhutasel*, 67 Iowa, 316; 25 N. W. Rep. 261; *Prewitt v. Martin*, 59 Mo. 325; *Bank v. McSpedon*, 15 Wis. 628; *Schwartz v. Brunswick*, 73 Mo. 256; *Grant v. Penderry*, 15 Kan. 236; *Lanahan v. Lawton*, 50 N. J. Eq. 276, 23 Atl. Rep. 476; *Scott v. Wagon Works*, 48 Ind. 75; 6 Enc. Pl. & Prac. 586, and cases cited. The order made by the trial court was strictly within the above rule, and deprived the defendant of no right to which it was entitled.”

Aug. 1919]

Opinion Per FULLERTON, J.

We conclude that the trial judge was in error in sustaining the challenge to the sufficiency of the evidence.

The judgment is reversed as to the part appealed from and the cause remanded for trial.

HOLCOMB, C. J., PARKER, and MOUNT, JJ., concur.

[No. 15259. Department Two. August 12, 1919.]

THE STATE OF WASHINGTON, *Appellant*, v. R. M. BROWN,
et al., *Respondents*.¹

CRIMINAL LAW (3-1)—STATUTORY PROVISIONS—CREATION AND DEFINITION OF OFFENSES. Rem. Code, § 5561-4, making it a misdemeanor to use any vehicle within the corporate limits of a city of the first class which shall be of such weight as to destroy or permanently injure the surface of the street, is not void for indefiniteness and uncertainty in failing to specifically point out the acts which constitute the offense.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 1, 1918, dismissing a prosecution for violating the road traffic law, upon sustaining a demurrer to the complaint. Reversed.

John Sandidge, for appellant.

Alexander & Bundy, for respondents.

FULLERTON, J.—Upon a complaint filed in a justice court of Snohomish county, respondents were convicted of violating the provisions of ch. 30 of the Laws of 1915, p. 65, and sentenced to pay a fine. They appealed from the judgment of conviction to the superior court of the county named, and in that court made the contention that the chapter of the laws upon which

¹Reported in 182 Pac. 944.

the prosecution was based was void for indefiniteness and uncertainty. The court sustained the contention and dismissed the prosecution. The state appeals.

The part of the statute alleged to have been violated makes it a misdemeanor :

“ . . . for any person to drive, propel, draw, move, convey or transport, or cause to be driven, propelled, drawn, moved, conveyed or transported, over, upon, along or across any public street, road or highway, without the corporate limits of any city of the first class, any vehicle or object which, with or without its load, shall be of such weight . . . as to destroy or permanently injure such street, road or highway or the surface, foundation or other part thereof,” Laws 1915, p. 65; Rem. Code, § 5561-4.

A further clause of the statute limits the load in any case to twenty-four thousand pounds. The complaint, however, was founded upon the provisions of the statute quoted, the charge being that the defendants drove over the highway certain motor trucks, heavily loaded with sawlogs, “which said trucks and logs, because of their weight and method of loading, permanently injured said highway and the paved surface thereof.”

The objection to the statute is that it does not definitely and clearly define the offense intended to be denounced by it. It is argued that a statute to be free from the objection of indefiniteness and uncertainty must be so far specific that a person may know in advance whether his act will or will not be a violation of the statute, and that this statute is not thus specific, since the operator of the vehicle cannot know until he actually makes the trial whether the load will or will not permanently injure the highway. In other words, the contention is that a statute, to be free from the objection that it is indefinite and uncertain, must specifically point out the acts which constitute the

Aug. 1919]

Opinion Per FULLERTON, J.

crime, not merely prohibit results produced by acts. But such is not the rule. The legislation in creating an offense may define it by a particular description of the acts constituting it, or it may define it as an act which produces, or is reasonably calculated to produce, a certain defined or described result. 16 C. J. 67. If this were not so, it would be easy to find many statutes now upon the books which are open to the objection of uncertainty, but which have heretofore never been suspected of that fault. As illustrations; the statutes making it an offense to willfully disturb any religious meeting (Rem. Code, § 2499), any assembly or meeting not unlawful in its character (Id., § 2547), or any school meeting (Id., § 4697), or the legislature, or either house thereof (Id., § 2337), are all statutes which do not specify the particular acts which will constitute the disturbance; yet no case can be found where they have been held invalid for that reason, while there are many which have allowed convictions thereunder to stand. Other illustrations, without specifically enumerating them, can be found in the statutes against malicious mischief, injury to public utilities, injuries to property, the statutes defining and punishing vagrancy, obstructing an officer in the discharge of his duty, publishing articles tending to excite crime or a breach of the peace, and the like, all of which define the crime by the result it produces rather than by the specific acts constituting the offense.

Another illustration is the statute directed against criminal anarchy, Rem. Code, § 2563. That statute makes it a felony to advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or to organize or to help organize, or to become a member of any society, group or assembly of persons formed to teach or advocate such doctrine. This statute is more

general in its definition of the acts constituting the offense than is the one at bar, yet in *State v. Lowery*, 104 Wash. 520, 177 Pac. 355, a conviction under it was upheld by this court. In the original brief the point that the statute was void for uncertainty was not made and was not noticed in the opinion, but the petition for rehearing, which was overruled, pointed out and thoroughly argued the objection.

In *State v. Stuth*, 11 Wash. 423, 39 Pac. 665, the defendant was informed against for disturbing a religious meeting. This statute, as we have shown, denounces the offense, but does not define the specific acts which shall constitute the offense. The objection was made that for this reason it was void for uncertainty, but the statute was upheld and the conviction sustained.

In New Jersey the statute made it an offense to encourage, justify, praise or incite the unlawful burning, destruction of private or public property, or advocate, encourage, justify, praise and incite assaults upon the army of the United States, the national guard, or the police force of any municipality by speech, writing or printing, in public or private. On an appeal from a conviction had under the statute, it was urged that the statute was void because uncertain in describing the offense. The court there said:

“This contention is palpably unsound. A plain reading of the statute makes it manifest that it is not open to the attack leveled against it. There is no organic law or rule of sound public policy that requires the legislature to define the meaning of English words in common and daily use. . . . This statute, like every other legislative act, is subject to judicial interpretation. When the occasion arises it will become the province of the court to determine what constitutes in law an ‘incitement,’ or, as the case may be, under the statute, and for the jury to determine the facts tend-

Aug. 1919]

Opinion Per FULLERTON, J.

ing to establish a breach of the statute under the law as defined by the court. The fact that the statute groups together various means by which the end may be accomplished and makes any one of them an offence when done, to attain the object denounced by the act, does not render such statute uncertain and void. Such legislation has received the sanction of a practice extending back to time immemorial, and we need only refer to our Crimes act in which there will be found numerous instances of legislation of this sort from the earliest period in the history of this state, down to the present time, and among which may be mentioned statutes relating to arson, burning, forgery, abortion, etc." *State v. Quinlan*, 86 N. J. L. 120, 91 Atl. 111.

In *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 243, 32 L. R. A. (N. S.) 505, the defendant was convicted under a statute making it a misdemeanor to commit any act which grossly disturbs the public peace. On the appeal, it was urged that the statute was void for uncertainty because it did not specify the particular acts constituting the offense. The court refused to sanction the contentions, pointing out that it was no more uncertain in the respect claimed than were many other statutes which the courts have upheld. In the course of the opinion, the court said:

"Now, in creating an offense the legislature, we apprehend, may define it by a particular description of the act or acts constituting it, or it may define it as an act which produces or is reasonably calculated to produce a certain defined or described result. . . . If the statute in question is void for uncertainty because the legislature failed to enumerate or describe the particular acts constituting it, then what can be said of the statutory definition of murder, and especially the second subdivision thereof, which says that homicide is murder 'when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although with-

out any premeditated design to effect the death of any particular individual'? The statute under consideration says that 'every person who willfully and wrongfully commits any act which grossly disturbs the public peace is guilty of a misdemeanor.' Is one any more uncertain than the other? In the former the act must be imminently dangerous to others and must evince a depraved mind, regardless of human life, and must result in the death of a human being. In the latter the act must be willful and wrongful, and it must produce a certain result, namely, the gross disturbance of the public peace."

It is clear, we think, that the statute in question is no more subject to the objection of uncertainty than are the statutes referred to, or the statutes upheld in the cases cited. Neither define the particular acts which constitute the offense, but denounce all acts which produce a certain defined or described result. Since it is within the province of the legislature to so create offenses, we cannot conclude that the statute is void for uncertainty.

We have not overlooked the argument to the effect that any use of a highway will eventually wear it out and thus permanently injure it, and that if permanent injury is the thing aimed at by the statute, all use of a highway must be prohibited by it. But the parallel is hardly exact. It is not ordinary use that is prohibited; it is that use which of itself causes an immediate and sudden permanent injury to the highway that is aimed at, and no user of the way can fail to recognize the distinction.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

HOLCOMB, C. J., PARKER, MOUNT, and BRIDGES, JJ., concur.

[No. 15307. Department Two. August 12, 1919.]

*In re LOCAL IMPROVEMENT DISTRICTS NUMBERS 29 TO 37,
in the Town of Grandview, Yakima County.*¹

MUNICIPAL CORPORATIONS (264)—CONFIRMATION OF ASSESSMENTS—APPEAL—FILING TRANSCRIPT—EXCUSE FOR FAILURE. While the filing of a transcript within ten days under Rem. Code, § 7892-22, is a jurisdictional step in the taking of an appeal from the confirmation of an assessment roll, it will not work a dismissal of the appeal where timely demand was made upon the city clerk and the failure to file the same within time was due to the inability of the clerk to prepare the transcript.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered January 6, 1919, dismissing an appeal from a city council's confirmation of a local assessment. Reversed.

Grady & Shumate, for appellants.

Richards & Fontaine, for respondents.

PARKER, J.—This is an appeal from a judgment of the superior court for Yakima county, dismissing an appeal from the levy and confirmation of local assessments by the town council of the town of Grandview. The town, having created local improvement districts for the construction of sewers therein, caused an assessment roll to be prepared, levying the cost of the improvements against the property claimed by the town authorities to be benefited thereby. The assessment roll was, after due notice and hearing thereon, confirmed by the town council by ordinance, over the objections of certain of the owners of property so charged with the cost of the improvements, which ordinance became effective on November 15, 1918. We assume, as counsel do in their briefs, that the assess-

¹Reported in 183 Pac. 107.

ments were all made and confirmed in one proceeding, though there were several local improvement districts.

The objecting property owners, considering themselves aggrieved by the levying and confirmation of the assessments, on November 22, 1918, within ten days after the confirmation of the roll, gave due notice of appeal from the decision of the confirmation to the superior court for Yakima county, by filing written notice of appeal with the town clerk and with the clerk of the superior court, and at the same time executing and filing with the clerk of the superior court a good and sufficient appeal bond, all as provided by Rem. Code, § 7892-22, relating to appeals in such cases. The objecting property owners did not, within ten days after the filing of their notice of appeal, file with the clerk of the superior court a transcript of the assessment proceedings, as provided by that section; and did not file such transcript until December 20, 1918, which, it will be noticed, was twenty-eight days after the filing of the notice of appeal.

On December 18, 1918, two days before the filing of the transcript, the town, by its attorneys, served upon the objecting property owners, and filed with the clerk of the superior court, a motion to dismiss their appeal. The motion came on for hearing after the filing of the transcript with the clerk of the superior court by the objecting property owners, and on January 6, 1919, the superior court entered its order dismissing the appeal, resting its order and decision upon the ground, as counsel for the town in the making of their motion did, that the filing of the transcript with the clerk of the superior court within ten days after the filing of the notice of appeal was a jurisdictional step in the taking of such appeal; and that the objecting property owners have not shown themselves excusable for their failure to file the transcript with the clerk of the supe-

Aug. 1919]

Opinion Per PARKER, J.

rior court within ten days after the filing of the notice of appeal, as provided by Rem. Code, § 7892-22. From this disposition of the case by the superior court, the objecting property owners have appealed to this court.

Before noticing the showing of facts made in the superior court touching the question of appellants' being excusable for their failure to file the transcript with the clerk of the superior court within ten days after the filing of their notice of appeal in that court, let us notice the law applicable to excusable failure in such cases. Section 7892-22, Rem. Code, prescribing the manner of taking appeals from the confirmation of local assessments, reads in part as follows:

"Such appeal shall be made by filing written notice of appeal with the clerk of such city or town and with the clerk of the superior court in the county in which such city or town is situated within ten days after the ordinance confirming such assessment roll shall have become effective, and such notice shall describe the property and set forth the objections of such appellant to such assessment; and, within ten days from the filing of such notice of appeal with the clerk of the superior court, the appellant shall file with the clerk of said court, a transcript consisting of the assessment-roll and his objections thereto, together with the ordinance confirming such assessment-roll, and the record of the council or other legislative body with reference to said assessment, which transcript, upon payment of the necessary fees therefor, shall be furnished by such city or town clerk and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript."

In *Goetter v. Colville*, 82 Wash. 305, 144 Pac. 30, we held that the filing by appellant of a transcript of the assessment proceedings with the clerk of the superior court is a jurisdictional step in the taking of an appeal from the confirmation of the assessments under this statute, the failure to perform which, on the part of

appellant, would render his attempted appeal of no effect. There was not in that case any question of excusable failure on the part of appellant to timely file the transcript with the clerk of the superior court. Now as we proceed, let us have in mind that, under this as under many appeal statutes, there are these two classes of jurisdictional steps to be taken by appellants in perfecting their appeal: (1) Acts which lie wholly within the power of the appellant to perform; such as the serving and tendering for filing of his notice of appeal, the executing and tendering for filing of his appeal bond, and the demand and tendering of fees for the transcript to be prepared and certified by the clerical officer having the custody of the record from which the transcript is made. (2) Acts which do not lie within the power of appellant to perform himself, or which it is not his duty to perform himself, such as the actual filing of his notice of appeal, appeal bond, and transcript by the clerk of the appellate tribunal; and also the preparation and certifying of the transcript of the proceedings by the clerk of the tribunal from which the appeal is taken, which acts the appellant is to cause to be performed, and a failure on the part of appellant to cause any of them to be performed within the time prescribed by the statute will, as a general rule, render his appeal of no effect. We think the law is that, as to those acts, though jurisdictional, which are not within the power or duty of the appellant to perform himself, his appeal will not be rendered ineffectual by their failure of performance if he has done everything by way of demand, tender of fees, etc., which the law imposes upon him, looking to their timely performance. For instance, if the appellant should timely tender to the clerk of the appellate tribunal for filing a proper notice of appeal, together with sufficient filing fees, and the clerk should refuse

to receive and file such notice within the time prescribed by statute for filing such notice, without fault on the part of the appellant, such acts on the part of appellant would be regarded in law as of the same effect as if the notice were in fact filed in time. It seems to us equally plain that, if these appellants have made proper and timely demand of the town clerk that he prepare, certify and deliver to them for filing in the superior court a transcript of the assessment proceedings, at the same time tendering to him proper fees therefor, and he has failed to timely comply with such demand, without fault on their part, and they with due diligence thereafter procured from him and filed a transcript of the proceedings, they will be deemed in law to have perfected their appeal within the time prescribed by the statute. Manifestly the preparation of the transcript is not within the duty of appellant to do himself, and its certification is not within his power to do himself. We are to remember that the section of the statute above quoted from by express terms provides that the transcript "shall be furnished by such city or town clerk and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript," and also states specifically what shall be embodied in the transcript.

In the text of 3 C. J. 1072, we read:

"As a rule, if delay in taking or perfecting an appeal or in filing or suing out a petition in error or writ of error is caused by the act or omission of the court or some official thereof when the act or occurrence of the court or of such official is necessary, the appeal may be taken or perfected, or the petition or writ of error filed or sued out, after the expiration of the prescribed time."

This view of the law is abundantly supported by the authorities there cited, and is applicable to all tri-

bunals from or to which appeals may be taken, whether courts or other bodies which act judicially, as town councils do in assessment cases of this nature. Among the decisions of the courts so holding, dealing with this question where there is involved jurisdictional steps in the taking of an appeal which are not within the power or duty of the appellant himself to perform, but making it his duty to see that they are performed, we note the following: *Cameron v. Calkins*, 43 Mich. 191, 5 N. W. 292; *Short v. Cohen*, 11 Ga. 39; *Holt v. Edmondson*, 31 Ga. 357; *Dobson v. Dobson*, 7 Neb. 296; *Cheney v. Buckmaster*, 29 Neb. 420, 45 N. W. 640; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Continental Bldg. & Loan Assn. v. Mills*, 44 Neb. 136, 62 N. W. 478.

It is manifest that, if the law were otherwise, one desiring to appeal from a judgment or decision rendered against him by an inferior tribunal could be deprived of that right without fault on his part by the neglect of some public officer to perform some official act necessary to the perfecting of the appeal. Plainly an appellant should not be permitted to suffer by such neglect of a public officer, the appellant himself being free from fault.

The facts upon which the trial court rested its order of dismissal of the appeal were shown by affidavits presented to the court at the hearing of the motion to dismiss. E. E. Horner, one of the appellants and owner of property which was sought to be charged with the cost of the improvement, stated in his affidavit, among other things, the following:

"That on Friday, the 22d day of November, 1918, in company with E. C. Ellis . . . (he) called upon Fred E. Swain, town clerk of the town of Grandview . . . and first read to him the notice of appeal to the superior court of Yakima county, Washington, the

Aug. 1919]

Opinion Per PARKER, J.

notice read being an exact copy of the notice filed in this court on the 22nd day of November, 1918; that after your affiant had finished reading the said notice, he handed it to the said clerk and requested that he file the same, and the said Fred E. Swain then accepted said notice; . . . that on the same date and at the same time, this affiant requested the said town clerk to immediately commence the preparation of a transcript of the records and proceedings had before the town council relative to the local improvement districts involved in this action; that he had a letter from the attorneys for the appellants, Grady & Shumate, which he read to said clerk and specifically called his attention to the fact that the transcript must be prepared and certified to before ten days so that it could be filed in the superior court as set forth in the letter of the said attorneys; that thereupon the said Fred E. Swain stated that he would immediately go to work to prepare said transcript; that this affiant, in the hearing and presence of the said E. C. Ellis at that time, asked the said clerk what his fees would be for preparing said transcript and the said Fred E. Swain stated that he could not tell what the fees would be and that as soon as the transcript was finished, he would let this affiant know the amount of his fees; that this affiant offered to advance the money for the clerk's fees at this time, being the 22nd day of November, 1918; that said Fred E. Swain stated that it would take him over Sunday to complete said transcript and this affiant believing that he had had time to prepare the same called upon the clerk on Monday, the 25th day of November, 1918, and asked him if the transcript was finished; that the said clerk answered him that he had not prepared the transcript; that it was too big a job for him and that he had sent to Chicago to the bond attorneys where they already had a complete transcript prepared, for the purpose of getting copies thereof to furnish the appellants in this case; that the said Fred E. Swain then stated to this affiant that he expected to have a return from Chicago within a week from the date of November 25th; that this affiant wrote the attorneys for the appellants, Grady & Shumate, that the clerk

had requested more time in which to get out the transcript, and at the expiration of the said one week this affiant called upon the said Fred E. Swain for the transcript and the clerk then said that he was having three or four girls work on the transcript and that it was about finished and that all that he lacked was the blue print from Chicago which he expected any day; that the clerk also said that as soon as the blue print arrived, he would turn over to this affiant the complete transcript certified”

E. C. Ellis, another owner of property within the district sought to be charged with the cost of the improvement, confirmed by his affidavit all the facts stated in the above quoted portion of the affidavit of Horner, as occurring in his presence. The town clerk in his affidavit denied the statements made by Horner and Ellis in some particulars, but admitted that Horner gave him the notice of appeal on November 22, and then demanded the preparation and certification of a transcript of the proceedings and made proper tender of fees therefor, and also that he did not prepare and have ready for delivery the transcript within the ten days prescribed by the statute, stating that he was unable to do so. While these affidavits also contain statements as to what occurred looking to the furnishing and certifying of the transcript of the assessment proceedings, after the expiration of the statutory time for the filing of the transcript with the clerk of the superior court, as to what then occurred prior to the filing of the transcript on December 20, we think it is sufficient to say that the affidavits render it plain that Horner and Ellis, representing the appellants, then exercised due diligence and did all within their power to hasten the preparation and filing of the transcript of the assessment proceedings with the clerk of the superior court. We are satisfied that Horner and Ellis, representing appellants, did not fail to do all that they

Aug. 1919]

Opinion Per PARKER, J.

were required to do under the statute looking to the timely filing of the transcript of the assessment proceedings in the superior court, and that such failure was solely because of the fault of the town clerk; and that therefore the appeal should be deemed to have been timely taken and perfected.

Some contention is made in behalf of the town that it was the duty of appellants to seek the hastening of the filing of the transcript of the assessment proceedings with the clerk of the superior court by mandamus proceedings; and some decisions are cited to sustain this contention. We are satisfied that there was no reason for appellants to regard it as necessary to institute mandamus proceedings against the town clerk prior to the expiration of the statutory period, and that mandamus proceedings instituted thereafter would not have resulted in a more prompt filing of the transcript with the clerk of the superior court than actually occurred. The decisions which hold that an appellant should resort to mandamus proceedings in such cases, have to do with situations where there was an undue delay after the expiration of the time prescribed by statute, or where the appellants had reason to believe before the expiration of the statutory time that the duty would not be performed as demanded within the statutory time.

Counsel for the town contend for a strict and literal construction of the statute, and suggest that the right of appeal exists alone by virtue of the statute, in the absence of which there would be no appeal. It is true that there would be no appeal in such cases from the decision of the city council to the superior court but for the statute. We are to remember, however, that this statute, by express terms, prevents the review of such an assessment proceeding in the courts other than by an appeal as provided therein. This means that

the right to review such proceedings by a suit in equity, which would exist in the absence of such statute, is taken away. Rem. Code, § 7892-23; *In re Local Improvement Sewer District No. 1*, 84 Wash. 565, 147 Pac. 199. These considerations suggest that care should be exercised by the courts in seeing that such right of appeal is not defeated by the failure on the part of an officer of a municipality to perform a plain duty which the appellant is entitled to have him perform, looking to the perfecting of his appeal.

The order of dismissal is reversed and the cause remanded to the superior court for further proceedings not inconsistent with the views herein expressed.

HOLCOMB, C. J., BRIDGES, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 15318. Department Two. August 12, 1919.]

JOHN A. LUND, *Respondent*, v. GRIFFITHS & SPRAGUE
STEVEDORING COMPANY, *Appellant*, COASTWISE
STEAMSHIP AND BARGE COMPANY, INCOR-
PORATED, *Defendant*.¹

MASTER AND SERVANT (20-1) — INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT—MARITIME WORK OF STEVEDORE. The amendment to the Federal Judiciary act of October 17, 1917 (U. S. Comp. St., §§ 991, 1233) saving to claimants in all civil causes of admiralty and maritime jurisdiction in the Federal courts the rights and remedies under the workmen's compensation law of any state, did not have the effect of establishing the jurisdiction of the state workmen's compensation act over personal injuries to workmen occurring on board ships, since the state act does not afford a remedy to such workmen or entitle the commission to collect premiums from employers therefor.

SAME (124)—INJURIES TO SERVANT—PLEADING—COMPLAINT—NEG-
LIGENCE ON PART OF MASTER—PLEADING NOTICE OF DEFECT IN MACHINE.
In an action for personal injuries to a stevedore resulting from

¹Reported in 183 Pac. 123.

Aug. 1919]

Statement of Case.

structural defects in the winches, making them unsuitable for the work, the master's knowledge need not be alleged in the complaint or directly proved, but may be inferred where they were discoverable either by inspection or by putting them into actual service.

SAME (129)—PLEADING—VARIANCE—DEFECTS IN MACHINE—EFFECT OF VARIANCE. It is not a fatal variance that the complaint alleged that winches were defective in having insufficient play in the eccentrics, making them difficult of control, and the proof showed that the throttle valves were intended to be described and were responsible for the difficulty of control; since under Rem. Code, § 299, a variance is immaterial unless it actually misled the party to his prejudice, and there was a failure to prove the allegation "in its entire scope and meaning."

SAME (155)—EVIDENCE—QUESTION FOR JURY AS TO MASTER'S NEGLIGENCE—TOOLS AND APPLIANCES—UNSAFETY OF WINCHES ON VESSEL. Whether winches were unsafe is a question for the jury where, although the evidence was conflicting, there was testimony that they were "touchy" and unsafe in the hands of any driver.

SAME (184)—ACTIONS FOR INJURIES TO THIRD PERSONS—VERDICT IN FAVOR OF THIRD PERSON—RELEASE OF MASTER. In a stevedore's action against the owner of a ship and the stevedoring company employing him, for injuries sustained through the use of defective winches on the ship, a verdict exonerating the ship owner does not exonerate the plaintiff's employer, where the latter undertook to load the boat employing its own means, even if the verdict was inconsistent and subject to some other form of relief.

TRIAL (101)—INSTRUCTIONS ALREADY GIVEN—REQUESTS. It is not error to refuse an instruction in the language requested where the court in its own language gave it in substance.

DAMAGES (84)—EXCESSIVENESS—INJURY TO LEG. A verdict for \$10,300, reduced by the court to \$6,300, for injuries sustained by a stevedore is not excessive where his leg was severely crushed and permanently injured and he was unfitted for his occupation.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 6, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a stevedore. Affirmed.

Grinstead & Laube, for appellant.

Walter S. Fulton, for respondent.

FULLERTON, J.—The respondent was injured while in the employ of the appellant working as a stevedore in the hold of the steamship Anyox. The vessel named was the property of the defendant Coastwise Steamship and Barge Company, Inc., who was using it in the lumber trade. Being desirous of taking on a cargo of lumber at Seattle, it engaged the appellant, a stevedoring company, to load the vessel. A part of the equipment of the vessel consisted of two steam winches, sufficiently close together to be operated by a single winch driver. The winches were controlled by levers, so arranged that the winch driver could stand between them and operate a winch with each hand. When on center, the ends of the levers intended to be gripped by the hands reached to the height of the hands of an ordinary man while standing, and the movement of a particular lever up or down caused the winch which it controlled to haul in or play out the line to which the lumber was attached while being carried from the wharf to the vessel.

In loading the vessel at the time in question, it was found necessary to use the winches. As a winch driver, the appellants employed one A. B. Anderson. Anderson was a winch driver of long experience, and no question is raised as to his competency. The accident giving rise to the injury to the respondent happened when the first winch load of lumber was brought on board the vessel. This consisted of a square piece of timber weighing several hundred pounds. It was carried successfully from its place on the wharf to the deck of the vessel and lowered partially into the hold. Just before being dropped on the floor of the vessel, Anderson in some manner lost control of the winches. He was unable to make them operate in unison, the result was that the timber swung crosswise of the hold. In one of its vibrations, it caught the respondent,

Aug. 1919]

Opinion Per FULLERTON, J.

crushing his leg against some part of the vessel, seriously and permanently injuring it.

The respondent brought this action against both the owner of the vessel and the appellant who was employed to load it. As grounds of negligence, he charged that the winches were defective in two particulars: first, that the winches were not adapted to the weight of the timber then being loaded in that they were too touchy because of having an eccentric with only one quarter inch play when, to have been reasonably safe, the eccentric should have had at least an inch play; and second, that the defendants were negligent and careless in the maintenance of the winches in that they had thereon spiral springs intended to keep the levers thereof on center, but which were so constructed as to prevent the levers from being easily and readily operated by the driver of the winches, thereby making it impossible for such driver to control the winches; further alleging that the injury to him was the result of the negligence of the defendants in the respects mentioned.

The defendants first demurred to the complaint; and after the overruling thereof by the trial court, answered, denying generally the allegations of negligence contained in the complaint, and pleading affirmatively contributory negligence and that the accident was the result of negligence of a fellow servant of the respondent. The issues were submitted to the jury against both of the defendants and resulted in a finding in favor of the defendant owner, and a finding against the appellant in the sum of ten thousand three hundred dollars. The trial court, on the contention that the verdict was excessive, offered the respondent the alternative of accepting a judgment for six thousand three hundred dollars or of submitting to a new trial. The respondent accepted the first branch of the

alternative proposed, and judgment against the appellant was entered in his favor in the last sum named. The appeal is from the judgment entered.

The appellant first assigns error on the order of the trial court overruling its demurrer to the complaint. Among the grounds of demurrer, was the ground of want of jurisdiction over the subject-matter of the action, the more particular contention being that such subject-matter was withdrawn from private controversy by the workmen's compensation act. It is conceded that this court held in the case of *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B 655, that the act referred to does not bar an action of this sort, founded as it is upon a maritime tort, but it is contended that the decision is rendered inoperative by the amendment to the Federal judiciary act of October 17, 1917. U. S. Comp. St., §§ 991, 1233. The act prior to its amendment vested in the Federal courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." The amendment added to the saving clause the sentence: "and to claimants the rights and remedies under the workmen's compensation law of any state." The argument is that the effect of the amendment is to establish the jurisdiction of state workmen's compensation acts over personal injuries to workmen occurring on board ships; and that, since our act makes the remedy exclusive in all instances where jurisdiction is given, it must follow that an injured workman cannot in this state resort to any other remedy.

But it will be observed that the Federal act does not purport to abolish the admiralty or common law remedies for maritime injuries. On the contrary, it still maintains these remedies in favor of an injured em-

Aug. 1919]

Opinion Per FULLETON, J.

ployee, and gives to him the additional remedy of the state compensation acts where such acts afford a remedy. But it is plain, we think, that our workmen's compensation act does not afford such a remedy. As we held in the case cited, the act was intended to be mutual in its operation, protecting employers of labor in certain enumerated employments, on the one side, from actions in courts of law for personal injuries, and giving to a workman injured while engaged in the numerated employments, on the other, a certain and sure relief for his injury, regardless of the manner in which the injury occurred or to whose fault it might be charged, and was intended to operate only in those instances which are within the exclusive legislative control of the state. It must follow, we think, that the amendment cited has no effect upon the workmen's compensation act of this state, or the remedies afforded thereby, however effective it may be in other states having a different system for relief in this regard. In the case of *Puget Sound Bridge & Dredging Co. v. Industrial Insurance Commission*, 105 Wash. 272, 177 Pac. 788, decided since this appeal was taken, we hold that the commission was not entitled to collect premiums for the industrial fund for the employees of the company whose work was confined exclusively to the company's dredges; this for the reason that the workmen's compensation act did not afford them protection against actions for injuries received by such workmen. In the course of the opinion, the amendment to the Federal judiciary act was noticed and it was held that it did not change the rule as formerly announced by this court. The case is in point on the question here presented. If the act does not so far operate against employers as to compel them to pay the premiums required by the act intended for the

benefit of the injured workmen, clearly it will not protect them from the remedies the act leaves open to the injured workmen. It follows that the trial court correctly determined that the action will lie.

A second ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. In this court it is urged that the complaint is fatally defective because it is not alleged that the appellant had notice or knowledge of the defect in the winches. But the allegation was unnecessary. A distinction exists in this respect between instances where the machinery is defective when furnished for use, and machinery which is in good condition when furnished but afterwards, by use or other causes, becomes defective while in the hands of the servant. It being the positive duty of the master to furnish his servants with reasonably safe appliances with which to do their work, it is sufficient, in an action to recover for a breach of this primary duty, to allege facts which show the duty and its breach; it is not necessary to go farther and specifically allege that the master knew, or by reasonable diligence would have known, that he had breached his duty. As we said in *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749:

“When the act is such that it must, in the nature of things, make unsafe the servant’s place of work, knowledge of that fact must of necessity be inferred from pleading the act. The principle contended for by appellant arises more frequently in connection with the duty to inspect and remedy defects than in any other class of cases. It would seem to be an application of a sound principle in an unsound way to invoke this rule strictly in a case such as here presented. Even where the primary negligence is the failure to inspect, provide and maintain a safe place, the knowledge of the master, when it may be inferred from the facts pleaded, is sufficiently pleaded as against de-

Aug. 1919]

Opinion Per FULLERTON, J.

murrer. *Gibson v. Chicago, M. & P. S. R. Co.*, 61 Wash. 639, 112 Pac. 919. 'Such knowledge by the defendant is generally regarded as sufficiently averred by an allegation that the defendant negligently permitted appliances to become defective and negligently suffered them to remain in a defective condition.' 6 Thompson, Negligence, p. 551, § 7529."

The principle is illustrated also by the case of *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S. Cir. Ct.) 313, where it was held that a servant of a railway company, suing for injuries caused by a defective car, must allege either that the car was defective when placed on the track, or that it afterwards became defective and that the railroad company had knowledge thereof.

It is next contended that there was no proof that the appellant had notice that the winches were defective. The proofs followed the allegations of the complaint. There was evidence which tended to show structural defects in the winches, defects which if not discoverable by mere inspection were readily discoverable by putting the winches into actual service. It was the province of the jury to believe this evidence, and if they did so believe it they were warranted in believing that the appellant could, by the exercise of reasonable diligence, have known of the defects.

"Where the defect in the appliance is shown to be structural and is of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employee who has been injured by such an appliance need not show that the master knew that it was defective." 26 Cyc. 1144.

In the complaint it is alleged that one of the defects in the winches was insufficient play in the eccentrics, making the winches difficult of control and thereby rendering them unsafe. The witnesses for the respondent, including the winch driver himself, described the de-

fect as a defect in the eccentric, while it appears elsewhere in their testimony that another part of the machine, namely, the throttle valves, was intended to be described. These, according to the witnesses, were so constructed that a too slight movement of the levers would cause the winches to reverse, making it difficult for the driver of the winches to control them. It is urged that this is such a fatal variance between the allegations and the proofs as to entitle the appellant to a reversal. But we cannot so conclude. A mere variance between the allegations and the proofs is not sufficient in all instances to warrant a reversal. By the express provisions of the code (Rem. Code, § 299), a variance between the allegations and the proofs is immaterial unless it shall have actually misled the adverse party to his prejudice in maintaining his defense upon the merits. It is only where there is a failure to prove the allegations of the complaint "in its entire scope and meaning" (Id., § 301), that such a result follows. In this instance, there was no contention in the court below that the defendant was misled to his prejudice by this difference between the allegations and the proofs, and certainly it is not a failure to prove a cause of action in its entire scope and meaning to allege that an appliance is defective because of a defect in one of its parts and prove that it is defective because of a defect in a part other than the part alleged.

A further contention in this connection is that there is no evidence showing that the winches were defective. The evidence on this question we have examined with some care, and we are convinced that the weight of the evidence is with the conclusion that the winches were not defective; that, while they differed somewhat in construction from winches in more common use, they were reasonably safe when operated by a winch

Aug. 1919]

Opinion Per FULLERTON, J.

driver familiar with these differences; and further, that the injury to the respondent in this instance was caused rather by the driver's unfamiliarity with the working of the winches than by any defect, structural or otherwise, in the winches themselves. But there is evidence the other way. Experienced winch drivers testified in substance that these differences were radical, rendering the winches "touchy" and unsafe in the hands of any driver, however skilled or familiar with them he might be. There was, therefore, such a conflict in the evidence as to make the question one for the jury to determine, and since they determined the conflict in favor of the respondent, this court, notwithstanding it may believe they were in error, has no authority to interfere.

Another contention is that the verdict in favor of the owner of the vessel operates as a release of the appellant. It is argued that the appellant was a mere agent of the owner for the loading of the boat, and is not liable while it was acting within the scope of the agency unless the principal is also liable. It is undoubtedly the rule that an intermediate servant is not liable for a negligent injury to a subordinate servant where he is guilty of no independent wrong and is but carrying out the directions of the common master. But the record here shows something more than this. The appellant was an independent contractor. Its contract was entire. It undertook to load the boat employing its own means and its own servants. For any negligent injury to its servants, it is liable regardless of the question whether another party may be also liable. It is true that the winches which caused the particular injury were a part of the equipment of the boat, in place when the appellant entered into its contract. But they were, nevertheless, as between the appellant and its servants, appliances furnished by the appellant to

its servants with which to work, and the appellant owed the servant the same duty to see that they were in proper condition that it would have owed them had it procured the winches from some other source. It may be true, also, that the verdict of the jury, in the light of the evidence, is inconsistent—that there is no apparent reason why they should have found against one defendant and in favor of the other; but this, while it might be grounds for some other form of relief, is not a ground for holding the verdict equivalent to a verdict in favor of both defendants.

The appellant requested an instruction to the jury touching the degree of care required of a master when furnishing appliances for the use of its servants. The court did not give the instruction in the language of the appellant, but gave it in substance in its own language. This was sufficient. In this state, the trial court may give a requested instruction in his own language however appropriate may be the language in which the request is framed. We are aware that the appellant contends that it was excluded from the benefit of the instruction as it was limited in terms to its codefendant. As the instruction given is quoted in the appellant's brief, it is faulty in the respect claimed, but an examination of the instruction, as certified to this court, shows that the appellant has not accurately quoted it. The concluding clause of the instruction as the appellant quotes it reads: "then the steamship company would not be chargeable with negligence," whereas the certified copy reads: "then neither the steamship company nor the stevedore company would be chargeable with negligence."

Finally it is contended that the verdict, even as reduced by the trial court, is excessive. The amount of the recovery allowed is substantial, but the respondent's injuries were severe and permanent. The timber

Aug. 1919]

Statement of Case.

struck the respondent's leg at the juncture of the middle and lower thirds. The bones were crushed and splintered and a jagged hole made in the flesh through which the bones protruded. Great difficulty was had in getting the bones to unite, and when they did unite the leg was crooked, so much so that the weight of the body no longer rests in a vertical direction upon the leg, causing pain in ankle joint when use is made of it. The respondent was a stevedore by occupation when injured, capable of earning and actually earning substantial wages. His injury unfits him for this occupation, and he must seek some other means of earning a livelihood. In the light of these conditions, we cannot think a further reduction in the recovery would be justified.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, and MOUNT, JJ., concur.

[No. 15116. Department Two. August 12, 1919.]

F. O. TALBOT, *Respondent*, v. INDUSTRIAL INSURANCE COMMISSION, *Appellant*.¹

MASTER AND SERVANT (121-2)—INJURIES TO SERVANT—REMEDIES UNDER WORKMEN'S COMPENSATION ACT—RETROACTIVE EFFECT. Laws of 1917, p. 76, amending the workmen's compensation act and providing that, if the injury renders the workman so helpless as to require the services of a constant attendant, the monthly payment shall be increased twenty dollars, applies from the date of the passage of the act to injuries that occurred previously; and to so apply it does not give the act a retroactive effect contrary to the intention of the legislature.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered September 5, 1918, reversing on appeal the rejection of a claim by the industrial insurance commission. Affirmed.

¹Reported in 183 Pac. 84; 187 Pac. 410.

The Attorney General, D. E. Twitchell, Assistant, W. V. Tanner, and G. H. Bucey, for appellant.

Donworth, Todd & Higgins, for respondent.

PARKER, J.—This is an appeal by the industrial insurance commission from a judgment of the superior court for Clallam county, reversing a decision of the commission which rejected and disallowed the claim of F. O. Talbot, made for an increased allowance because of his permanent disability and of his being so physically helpless as to require the constant services of an attendant.

The controlling facts are not in dispute, and may be summarized as follows: On May 12, 1917, Talbot was injured while employed in an extra hazardous occupation. His case was classified by the commission as one of "permanent total disability." The commission awarded him an allowance of \$20 per month. Talbot's injuries were such that he is, and has been at all times since he was injured, not only totally disabled in the sense that his earning power is entirely destroyed, but he has been at all times since he was injured "so physically helpless as to require the services of a constant attendant;" and this he claims entitles him to an increased allowance of \$20 per month so long as such requirement shall continue; resting his claim upon the conceded facts as to his condition and the provisions of chapter 28, Laws of 1917, p. 76, amending the workmen's compensation act.

On May 12, 1917, at the time Talbot was injured, the workmen's compensation act as then in force, paragraph b, Rem. Code, § 6604-5, fixed the compensation for injured workmen in cases of "permanent total disability" at a minimum of \$20 per month and a maximum of \$35 per month. The award of \$20 per month and the refusal to award an increased monthly

Aug. 1919]

Opinion Per PARKER, J.

allowance, as claimed by Talbot, was rested by the commission upon the theory that the law as existing at the time he was injured is the only law controlling the amount of monthly allowance he is entitled to. The legislature of 1917 amended that paragraph by adding thereto the following:

“In case of total permanent disability, if the character of the injury is such as to render the workman so physically helpless as to require the services of a constant attendant, the monthly payment to such workman shall be increased twenty dollars (\$20.00) per month so long as such requirement shall continue, . . .” Laws of 1917, p. 78.

The increased award so provided in the amendment is subject to certain exceptions which it is not necessary to here notice. This amendment went into force June 6, 1917, after Talbot had received his injuries.

Counsel for the commission, while conceding that Talbot's condition is and has been, since he was injured, such as to bring his case under the amendment of 1917, if he had been injured after the going into force of the amendment, contends that his case does not come under the amendment because of his injury occurring before the amendment went into force. The argument is, in substance, that to award him such increased allowance would be to give the amendment a retroactive effect, and that there is nothing in the amendatory act suggesting any such legislative intent. We may concede, for argument's sake, that to award Talbot such increased allowance for any time he was in a helpless condition prior to the going into effect of the amendment would be to give it a retroactive effect, contrary to the intent of the legislature. The trial court, reversing the commission's refusal to award the claimed increased allowance, decided that Talbot was entitled thereto, but only from the date of the going

into effect of the amendment, and directed the commission to make such allowance, commencing as of that date, and continue the same "so long as the plaintiff by reason of his said injuries shall require the services of a constant attendant." We are of the opinion that this is not the giving to the amendment a retroactive effect, contrary to the intention of the legislature. The power of the legislature to provide for such an increased monthly allowance in such cases is not questioned by counsel for the commission, the only question here presented being as to the legislative intent in enacting the amendment.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

ON REHEARING.

[*En Banc*. February 9, 1920.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment of the trial court is affirmed.

Aug. 1919]

Opinion Per PARKER, J.

[No. 15118. Department Two. August 13, 1919.]

HARRY C. PARKER, *Respondent*, v. INDUSTRIAL
INSURANCE DEPARTMENT, *Appellant*.¹

MASTER AND SERVANT (121-2)—INJURIES TO SERVANT—REMEDIES UNDER WORKMEN'S COMPENSATION ACT—PARTIAL DISABILITY—RECOVERY FOR DIFFERENCE IN EARNING POWER—STATUTES—CONSTRUCTION. In view of Rem. Code, § 6604-5 (d), providing that, in case of recovery and partial restoration of earning power by an injured workman, payments shall continue in the proportion which the new earning power shall bear to the old, a remittitur on appeal and judgment therein, under a decision quoting the statute and directing the insurance department to make such an order for compensation as will reasonably cover the difference in the wage-earning power, means no more than that the award shall be in the proportion which the new earning power shall bear to the old.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered September 5, 1918, in favor of the plaintiff upon remittitur from the supreme court. Affirmed.

W. V. Tanner, and *D. E. Twitchell*, Assistant Attorney General, for appellant.

Turner, Nuzum & Nuzum, for respondent.

PARKER, J.—This is an appeal by the Industrial Insurance Department from the judgment of the superior court for Spokane county, entered in this case upon the going down of the remittitur from our decision rendered herein, modifying the judgment of that court; our decision being reported in 102 Wash. 54, 172 Pac. 830. The contention here made in behalf of the department is that the judgment of the superior court is not such as was directed by this court to be entered in the case.

¹Reported in 183 Pac. 82.

The concluding language of our decision upon which the clerk of this court entered formal judgment, is as follows:

"It seems to us that the law makes provision for a case like this.

" 'As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the *payments shall continue in the proportion which the new earning power shall bear to the old.* Rem. Code, § 6604-5 (d).'

"Instead of cutting off respondent's allowance altogether, the department should have made an order covering this difference between the present earning capacity of the respondent and his former earning capacity. Considering, then, the spirit of the law, that an injured workman in extra hazardous employment shall have 'a sure and certain recovery,' and the letter of the law as we conceive it to be, the case will be remanded to the superior court to be from thence transmitted to the department with directions to make such an order as will reasonably cover the difference in the wage-earning power of the respondent. It is so ordered."

We have italicized the portion of the statute quoted and made a part of our decision, to be particularly noticed. The formal judgment of this court entered by the clerk and embodied in the remittitur, directed the superior court, "to modify its judgment so that respondent will recover the difference in his wage earning power." Upon the going down of the remittitur, the superior court entered its judgment, which, in so far as we need here notice its language, reads as follows:

"It is further ordered, adjudged and decreed that defendant (Insurance Department) make such an order for compensation to the plaintiff herein, Harry

Aug. 1919]

Opinion Per PARKER, J.

C. Parker, as will reasonably cover the difference in the wage earning power of said plaintiff."

This appeal seems to have been prompted by a fear on the part of the department that the judgment rendered by the superior court must be construed as compelling the awarding to respondent of the full amount of the difference between his former and present earning power; that is, for instance, if his former earning power was \$4 per day and his present earning power is \$3 per day, that he must be awarded the full difference of \$1 per day. Looking alone to the language of the judgment of the superior court, there may be some reason for contending that such is its meaning, and that it is not in exact accord with the directions of this court, though it is in almost the exact language of the remittitur and the concluding few words of our decision. But we think that neither our decision, the remittitur, nor the judgment of the superior court, read in the light of the italicized portion of the statute quoted in and made part of our decision, means anything more than that the award to respondent shall be "in the proportion which the new earning power shall bear to the old," and not that the award shall necessarily be for the full difference between the old and new earning power. While the language of the judgment of the superior court, of the remittitur, and of the concluding few words of our decision, might have been more precise in this particular, we think it plain that all mean no more than this. So construed, the judgment of the superior court is as directed by this court to be entered.

The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15288. Department Two. August 13, 1919.]

GREAT NORTHERN RAILWAY COMPANY, *Appellant*, v.
STEVENS COUNTY, *Respondent*.¹

COUNTIES (86)—TAXATION — LIMITATIONS — NECESSARY EXPENSES. Under Rem. Code, § 9213, expressly limiting the levy for county current expenses to eight mills, which is the only authority for the levy of such a tax, a tax in excess of eight mills is invalid, and cannot be sustained upon the theory that the same was required to meet necessary governmental expenses.

COUNTIES (86)—POWER TO LEVY TAXES. There is no implied power in counties to levy taxes, but the same exists only by express statutory authorization.

APPEAL (483)—DECISION—EFFECT ON STRANGERS—RELIEF TO TAXPAYERS AS CLASS. In an action by a taxpayer to recover excess county taxes paid, in which there is sought on behalf of all other taxpayers a perpetual injunction against the expenditure of the amount of excess taxes collected, the relief will be confined to repayment of plaintiff's excess taxes, where no injunction was issued, the year for which the taxes were levied has long since expired, and there was no means of knowing the circumstances under which the several taxpayers paid the excess levy.

Appeal from a judgment of the superior court for Stevens county, Hill, J., entered September 25, 1918, upon findings in favor of the defendant, dismissing an action to recover taxes paid. Reversed.

F. V. Brown and *Thomas Balmer*, for appellant.

Osee W. Noble and *L. B. Donley*, for respondent.

PARKER, J.—The plaintiff railway company seeks recovery of the sum of \$1,628, which it claims was illegally exacted from it by the taxing officers of Stevens county in March, 1918, upon its property in that county, assessed and levied in the year 1917. A trial upon the merits in the superior court for that county, sitting without a jury, resulted in judgment

¹Reported in 183 Pac. 65.

Aug. 1919]

Opinion Per PARKER, J.

denying to the railway company the relief prayed for; from which it has appealed to this court.

The controlling facts are not in dispute, and may be summarized as follows: In October, 1917, the board of county commissioners, at its regular session held for that purpose, voted an amount for the county current expense fund for the ensuing year to be raised by a tax upon the taxable property within the county, which called for a levy of 9.3 mills on each dollar of the assessed value of such property; and thereupon voted and made such levy of 9.3 mills. The total assessed value of the railway company's property within the county was in amount such that, had the levy been 8 mills instead of 9.3, the railway company would have been required to pay \$1,628 less in taxes for that year than was exacted from it. On March 6, 1918, the taxes having become due, the railway company was compelled to pay, and did pay, to the county treasurer the full amount levied and assessed against its property, including the excess of \$1,628, resulting from the excess levy of 1.3 mills, then claiming and protesting such excess levy of 1.3 mills to be illegal and made wholly without legal authority. It is to recover from the county an amount equal to this claimed excessive amount of \$1,628, so exacted and paid by the railway company, that it commenced this action in the superior court for Stevens county in May, 1918.

The only express power to be found in our statutes authorizing boards of county commissioners to levy taxes for "county current expenses," is found in Rem. Code, § 9213, which reads as follows:

"For the purpose of raising a revenue for the state; county indebtedness, county current expense, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment-roll, sufficient for

such purposes: Provided, that state tax shall not exceed the amount levied by the state board of equalization; the tax for payment of county indebtedness shall not exceed five mills; the tax for payment of county current expense shall not exceed eight mills; the school tax shall not exceed eight mills, except for districts in cities of ten thousand or more inhabitants, where it shall not exceed ten mills, unless the board of directors thereof shall by unanimous consent of all its members determine upon a greater levy, not exceeding two per cent; the road tax shall not exceed five mills; the bridge tax shall not exceed three mills, and all other taxes shall be in accordance with the laws of the state."

This section not only constitutes the only express statutory grant of power to boards of county commissioners to levy taxes for county current expenses, but it also contains an express limitation upon that grant of power, to wit: that "the tax for payment of county current expense shall not exceed eight mills." It is argued by counsel for the county that the limitation in this section upon the levy for county current expenses to eight mills is subject to the exception that, in case an eight mill levy will not produce enough funds to pay the necessary current expenses of the county for the ensuing year—that is, the actual necessary expense of maintaining the several departments of the county government—the board is authorized to make a levy sufficient therefor in excess of eight mills. Counsel for the county invoke, by way of analogy, the general rule that the constitutional debt limit is not applicable to the incurring of obligations by the county in the maintaining of its necessary governmental functions; and rely upon the showing made in this case, as claimed by them, that all the items of the estimate of expense, payable out of the current expense fund, made in pursuance of Rem. Code, § 9212, are necessary ex-

Aug. 1919]

Opinion Per PARKER, J.

penses to be incurred in the maintenance of the governmental functions of the county for the ensuing year. While the arguments of counsel on both sides of this case are directed almost wholly to the question of such necessity for the incurring of the expenses for certain of the several items specified in the estimate of current expenses for the ensuing year, we think the reason of the rule of the exception touching the constitutional debt limit of counties has no application in this controversy. As we view the law, it does not follow that, because the board of county commissioners may have in certain cases of necessity the implied power to incur obligations for current expenses of the county government beyond the constitutional debt limit, it may levy a tax in excess of the amount which this statute has prescribed and expressly limited. There are decisions of the courts which seem to hold that, ordinarily, the granting of power to the governing bodies of counties and municipalities to incur obligations of a particular character implies the power to levy taxes to provide funds for the payment of such obligations. But no decision has come to our notice which holds that an express statutory limitation upon the taxing power of such governing boards may under any circumstances be exceeded.

In the text of vol. 1 of Cooley on Taxation (3d ed.), at page 465, that learned author says:

“The fact that the state creates municipal governments does not by implication clothe them with the power to levy taxes. That power must be conferred in terms, or must result by necessary implication from the language made use of in the law. But it is not requisite that any particular technical or legal terms shall be made use of in giving the power; it is enough that the purpose is apparent, and that on a fair construction of the language employed the legislature must be deemed to have intended that the power should

exist. Where authority to contract debts is given, authority to tax for their satisfaction may be deemed given also, without express words to that effect, if such appears to be the intent of the legislature; but an implication to that effect is not a necessary one, and a person who contracts with the municipality must take notice of its power to tax, and of any limitations thereof that may exist."

This statement of the law it would seem is especially applicable to counties and their governing bodies, since counties, though legal entities, and in a sense municipal corporations, are but political subdivisions of the state, and as such are but agencies of the state, subject to legislative control. Even our constitution in § 1 of article 11, refers to counties as "legal subdivisions of this state." 7 R. C. L. 923, 936; 15 C. J. 388, 420, 632.

In the text of 15 Corpus Juris, at page 632, it is said: "A county has no inherent power to levy taxes, but the power is dependent on legislation." This view of the law is abundantly supported by the decisions of the courts there cited, among which we note the following: *Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270; *Booth v. Opel*, 244 Ill. 317, 91 N. E. 458; *Russell County v. Hill*, 164 Ky. 360, 175 S. W. 988; *Jackson v. Board of Com'rs of Surry County*, 171 N. C. 379, 88 S. E. 521; *Obenchain v. Daggett*, 68 Ore. 374, 137 Pac. 212.

The last cited case, while recognizing the rule as stated in the above quotations from Cooley on Taxation and Corpus Juris, is of interest as showing under what circumstances the power of taxation will be implied from the power to incur debts and obligations on the part of the county, there being no express statutory limitation upon the taxing power involved in that case. Our decisions in *Meehan v. Shields*, 57

Aug. 1919]

Opinion Per PARKER, J.

Wash. 617, 107 Pac. 835, and *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639, are in harmony with the law as stated in the above quotations from Cooley on Taxation and Corpus Juris. We think it is quite plain that there is nothing in our statute law which lends support to the view that a board of county commissioners has the implied authority to exceed the tax levying power prescribed and limited by the express provisions of Rem. Code, § 9213, above quoted.

When we look to our state constitution, it appears equally plain that no tax levying power is, by the terms of that document, vested in counties or county authorities; but that such power can exist only by grant from the sovereign state, which, of course, means by legislative enactment. In section 9 of article 7 of the constitution we read:

“All municipal corporations may be vested with authority to assess and collect taxes.”

And in section 12 of article 11 we read:

“The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.”

We find no language in our state constitution coming any nearer than these provisions to granting the power of taxation to the governing bodies of counties or municipal corporations, other than cities of the first class having power to frame and adopt their own charters. It seems plain to us that this language does not grant such power, but leaves it to be granted by the legislature, attended by such conditions and lim-

itations as that body may prescribe. We conclude, therefore, that the tax levy made by the board of county commissioners for Stevens county, to the extent that it is in excess of eight mills, was made wholly without authority of law, and that the railway company is entitled to relief therefrom.

In its complaint the railway company prays in behalf of itself and all other taxpayers of the county similarly situated, and here makes contention that the county authorities "be perpetually enjoined and restrained from expending any of the amount of taxes collected or to be collected by reason of said excessive levy." In view of the fact that there was no temporary injunction issued in this case looking to the preservation of the funds in the manner prayed for; that the year 1918 for which the tax levy here involved was made, during which it became collectible and was to be expended, has long since expired; that we have, in this record, no means of knowing the circumstances under which the several taxpayers may have paid to the county treasurer the excessive levy and cannot tell what their several rights would now be with reference thereto, we think it is impractical to go farther in this case than to award the railway company judgment for the amount of illegal tax which it was compelled to pay. We therefore dispose of the case as though it were simply one on the part of the railway company seeking recovery of the amount of taxes unlawfully exacted from it, leaving other taxpayers free to enforce such rights as they may possess.

The judgment is reversed and the cause remanded to the superior court for Stevens county, with direction to enter a judgment in favor of the railway company and against the county for the amount of \$1,628, with legal interest from March 6, 1918, the date on

Aug. 1919]

Opinion Per HOLCOMB, C. J.

which the railway company was compelled to and did pay the excessive and illegal tax in that sum.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15293. Department One. August 13, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM V. KELLEY *et al.*, *Appellants*.¹

EMINENT DOMAIN (86-88, 136) — COMPENSATION — DEDUCTION OF BENEFITS—INSTRUCTIONS TO JURY. In condemnation proceedings on behalf of the state for the purpose of a public highway, there may be offset against the damages, as special benefits to lands not taken, the enhancement of the market value after the improvement; and the jury is properly instructed that the measure of damages is the market value of the strips taken, together with the depreciation caused by the taking, from which the jury should deduct such sum as the lands were actually benefited or enhanced in value by the construction of the road; and it was not necessary to define general or common benefits and then tell the jury not to consider them.

Appeal by landowners from a judgment of the superior court for Whitman county, McCroskey, J., entered November 25, 1918, upon the verdict of a jury awarding damages in eminent domain proceedings. Affirmed.

A. E. Gallagher, for appellants.

The Attorney General, Glenn J. Fairbrook, Assistant, and *John H. Dunbar*, for respondent.

HOLCOMB, C. J.—This appeal involves two proceedings brought by the state to condemn for road purposes certain lands in Whitman county owned by appellants, consolidated for trial and tried together. In the proceedings below, the appellants were designated as respondents.

¹Reported in 182 Pac. 942.

Appellants assign and rely for reversal of the judgment on alleged errors of the court in refusing to give a certain instruction requested by them, and in giving and refusing to withdraw from the jury certain parts of instructions.

The instruction requested by appellants and refused is as follows:

“You are instructed that, in arriving at your verdict in each of these two cases, you will not consider any general benefit to any of the land involved in either of these two cases by reason of any increased value of such land which is common to the neighborhood or community generally and which arises from the supposed advantage which will accrue to the community generally by reason of the construction of the road in question.”

The giving of the following portions of instructions is also complained of, viz.: Part of instruction No. 4, as follows:

“ . . . from which you will deduct such sum in each case as you may find from the evidence that respondents' respective lands will be actually benefited, that is, materially enhanced in value, by the construction of the road, if you find they are so benefited thereby.”

Part of instruction No. 8, as follows:

“If you find that respondents' land in either or both instances are damaged as hereinbefore defined to you more than they are so benefited by the taking of the lands sought to be condemned, then the difference between the amounts of damages found by you under these instructions and the amount of such benefits, in case you find the respondents are so benefited by such taking, should be the amount of your verdict in each of the cases in favor of the respective respondents.”

And in giving part of instruction No. 8, as follows:

“If you find from the evidence that the respondents in one or both of the cases are so benefited by the con-

Aug. 1919]

Opinion Per HOLCOMB, C. J.

struction and opening of said road as much or more than they are damaged thereby, as damages are here-inbefore defined to you, then you should find for such respondents in either instance in nominal damages only."

On the submission of the case to the jury, they returned a verdict in favor of appellants for \$607. A motion for new trial was unsuccessfully interposed, and judgment entered in favor of appellants for the above sum.

It is first contended that the court did not, anywhere during the trial or in its instructions to the jury, define or tell the jury what were special benefits or what were not special benefits that could be considered in these cases in arriving at their verdicts; but instead, by refusing to give the requested instruction and giving those parts of instructions Nos. 4 and 8 complained of, the court permitted the jury to consider the increased market value of the land by reason of the increased facilities of travel caused by the construction of the road. It is earnestly insisted that only such special benefit to the land can be offset against damages as are peculiar and special to the remaining land by in some way affecting the corpus of the remaining land; that this special benefit must be one that is not enjoyed in common, to a greater or less degree, by the neighborhood in general.

These being condemnation proceedings on behalf of the state for the purpose of a public highway, the court followed the principle announced in *Great Northern R. Co. v. State*, 102 Wash. 348, 173 Pac. 40, allowing special benefits to be offset against the damages to the land not taken on behalf of the public, and the only question involved is, What are special benefits which may be offset against damages to the land not taken in such case?

It is true the court did not charge the jury as to what constituted general or common benefits, except to the extent defined in the following instruction:

“You are instructed that the owner of lands through which a highway is established is entitled in common with the general public to travel on such highway, and although by reason of such improvement such travel may be rendered easier or more pleasant for such owner, yet the benefit afforded to him thereby is a general benefit in common with the remainder of the public, and you will not in arriving at your verdict in either of these cases make any deduction from any damages you may find in favor of the owner by reason of this mere right to travel over the proposed highway.”

In *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, we held that the building of a bridge and opening of same for highway purposes is a special benefit to property abutting on the approach, which may be offset against the damages from a change of grade of the street, and that where a street railway company, under direction of a city, builds a bridge which is to be open to public travel, the special benefits to abutting property may be offset against the damages. In that case we quoted with approval from the decision in *Metropolitan W. S. El. R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, to the effect that:

“If a piece of property is enhanced in value, such enhancement—or, in other words, benefit to the property, cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as ‘general benefits,’ ‘benefits common to other property,’ and the like expressions, to be found in

Aug. 1919]

Opinion Per HOLCOMB, C. J.

decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer a general benefit."

The evidence introduced in this case on behalf of the state tended to show that the properties involved were specially benefited by the proposed improvement to the extent that the difference between the market value, before the improvement and after the improvement was laid, of the lands affected not taken by the appropriation would amount to an enhancement of from five to ten dollars per acre.

This, it is claimed by appellants, does not constitute special benefits, but only some actual addition to the lands remaining by reason of some improvement in the corpus or some special facility afforded the land not afforded to other lands of the same character abutting the highway would be considered special benefits, and all other benefits are general benefits. But we held in *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794, that:

"It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration. But the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited and are not chargeable therewith, for the reason that none of their lands were appropriated and no damages were claimed by them."

In *Hilbourne v. Suffolk*, 120 Mass. 393, 21 Am. Rep. 522, quoted with approval in *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, it is said:

"The advantages that an abutter may receive from his location on a highway laid out, altered or widened,

are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of a similar kind."

The court correctly instructed the jury that the measure of damages in these cases is the fair market value of the strips of land actually taken for the right of way, together with the depreciation, if any, of appellants' lands, caused by the taking of the right of way for the road; or, in other words, it would be the difference between the market value of appellants' lands immediately before and after the appropriation of the right of way for the road, from which the jury should deduct such sum in each case as they found from the evidence that appellants' respective lands would be actually benefited; that is, materially enhanced in value by the construction of the road, if they found appellants were so benefited thereby; that in determining the compensation for the lands taken by the petitioner in each of these cases the jury must determine the fair market value of the strip of land taken for the right of way (then specifying the elements to be considered in determining the fair market value); then finding depreciation, if any from any cause, and the market value of the remainder of appellants' lands, and that then in estimating the respective appellants' damages they should take into consideration the difference, if any, between the value of the respective appellants' lands after the highway is appropriated and built as compared with its value before, and if they found the land would be actually benefited—that is, materially enhanced in value by the construction of the proposed highway—they should offset such benefits against such damages as they might find.

We have read the instructions as a whole and consider that they properly submitted the question of dam-

Aug. 1919]

Statement of Case.

ages and special benefits to the jury. It was not necessary to define general or common benefits and then tell the jury they could not consider such benefits, but it was sufficient to submit to the jury the exact measure of damages and measure of benefits which they were to consider and determine. This, we consider, was done by the instructions and we find no error therein.

The judgments are affirmed.

MITCHELL and TOLMAN, JJ., concur.

MACKINTOSH and MAIN, JJ., concur in the result.

[No. 15180. Department One. August 15, 1919.]

FRANK J. KENT, *Respondent*, v. WALLA WALLA VALLEY
RAILWAY COMPANY, *Appellant*.¹

RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—QUESTION FOR JURY. The positive testimony of witnesses that a crossing whistle was given by an interurban car does not, as a matter of law, overcome evidence of witnesses who could have heard the signal if it had been given and who testified that they heard none.

SAME (64-66) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. The driver of an automobile is not guilty of contributory negligence, as a matter of law, in failing to stop before driving across an interurban track, where he both looked and listened, his car was making very little noise, his view was obstructed, and when the train first came in view, he was so close to the track as to be unable to stop in time to avoid the collision.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 12, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

John A. Laing, Sharpstein, Smith & Sharpstein, and
John H. Pedigo, for appellant.

E. L. Casey, for respondent.

¹Reported in 183 Pac. 87.

MAIN, J.—The purpose of this action was to recover damages for personal injuries and damages to an automobile, claimed to be due to negligence chargeable to the defendant. In the answer, it was affirmatively pleaded that the damages claimed were caused by the contributory negligence of the plaintiff. The cause, in due time, came on for trial before the court and a jury. At the conclusion of all the evidence, the defendant moved for a directed verdict. This motion was denied and the cause was submitted to the jury, and a verdict rendered in favor of the plaintiff in the sum of \$804.33. After the verdict was rendered, the defendant moved for a judgment notwithstanding the verdict, which motion was overruled and judgment was entered on the verdict. It is from this judgment that the appeal is prosecuted.

The facts which are either not in dispute or which the jury had a right to find from the evidence may be summarized as follows: The appellant operates an electric interurban railway running from the city of Walla Walla, this state, to Milton, in the state of Oregon. The respondent lived on a ranch a few miles out of the city of Walla Walla. The damages for which recovery is sought are the result of a collision which occurred at the intersection of what is referred to as Finch avenue road, which extends north and south, and Wallula avenue road, running east and west. For some distance to the north of this intersection and also to the south, the track of the interurban is along the east side of Finch avenue road. Approximately six feet from the west rail of the track, on the north side of the intersection and bordering thereon, is what is referred to as a small depot or shelter station. This is a building approximately twelve feet long, ten feet high, and eight feet wide, the long way of which extends north and south. The respondent lived six or

Aug. 1919]

Opinion Per MAIN, J.

seven hundred feet south of the intersection. On the morning of the day the accident occurred, he left his home in his automobile, proceeding up the Finch avenue road, which parallels the interurban track, and turned to cross the track at the intersection, when the front end of the automobile was struck by an interurban car approaching from the north.

The respondent testified that, as he approached the intersection, he looked in both directions and listened for the approach of a car. As he entered the intersection he swung to the left, so as to get a view back of the service station to the north to see if a car was approaching. Seeing none, he pulled upon the macadam in the center of Wallula avenue roadway, looking again to the south and to the north. He then saw a car approaching from the north and within about fifty feet of the center of Wallula avenue roadway. The speed of the automobile was approximately ten miles per hour at the time, and he made every effort to stop it before reaching the railway tracks.

The motorman upon the car testified that, as he passed the service station, he observed the respondent for the first time and his distance from the approaching car was approximately thirty or forty feet. The service station was an obstruction which prevented the respondent from seeing the approaching interurban car, and also prevented the motorman from seeing the approaching automobile.

In the complaint, a number of grounds of negligence were alleged, one of which was failure to blow the whistle as the automobile approached the crossing and station. For the purpose of this decision, it will be assumed that none of the other grounds of negligence were sustained.

No motion for a new trial was made, and the appellant relies for reversal upon two points: first, that

the positive evidence of witnesses, who testified that the whistle was sounded for the crossing, overcomes the negative testimony of other witnesses to the effect that they heard no approaching signal given. In support of this position the appellant cites the case of *Holland v. Northern Pac. R. Co.*, 55 Wash. 266, 104 Pac. 252, but that case is not controlling. There, on the day of the accident, the condition of the elements was such that it was said that the parties testifying that they did not hear the whistle could not have heard it if one had been sounded. Here there is evidence that, just prior to the collision, and apparently when the motorman first saw the automobile, a "little toot" of the whistle was given. In addition to this, the parties testifying were so situated that they could have heard the signal for the crossing, which was one long and two short whistles, had it been given. The witnesses, or some of them, who testified that the signal was not given for the crossing, heard a short whistle just prior to the collision. If they heard this, as they claim, there is no reason why they could not have heard the crossing signal had it been given. Even though the positive testimony that the signals were given may seem the more credible, we cannot say that the evidence that the signal was not given is overcome. The question of negligence was properly submitted to the jury.

The second point is that the respondent was guilty of contributory negligence, as a matter of law, because he failed to stop before attempting to cross the railway tracks. He testified that he both looked and listened and that he neither saw nor heard the approaching car. Had he stopped, his view would still have been blanketed by the service station. He testified that he was driving a practically new automobile and that the engine made very little noise. Upon this

Aug. 1919]

Opinion Per MAIN, J.

question the appellant cites the cases of *McKinney v. Port Townsend & Puget Sound R. Co.*, 91 Wash. 387, 158 Pac. 107; *Herrett v. Puget Sound Traction, Light & Power Co.*, 103 Wash. 101, 173 Pac. 1024; *McEvilla v. Puget Sound Traction, Light & Power Co.*, 95 Wash. 657, 164 Pac. 193; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550; *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549.

In each of those cases the driver of the vehicle, as he approached the crossing and when the obstructions no longer blanketed his view, could have seen the approaching train or car in ample time to have stopped had he looked. In this case the motorman did not see the approaching automobile until he was within approximately forty feet of where the collision occurred. The respondent testified that he saw the car approximately fifty feet distant from the place of the collision. From this evidence it is apparent that, as the respondent approached the crossing and when he reached the place where his view would not be obstructed by the service station, he was so close to the track as to be unable to stop in time to avoid the collision.

Before it could be held that the respondent was guilty of contributory negligence as a matter of law, it would be necessary to find that a reasonably prudent man, in the situation in which he was, would not have proceeded to cross the track. Even where the facts are not in dispute, if different minds may honestly draw different conclusions from them, the case is one for the jury. *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820; *Averbuch v. Great Northern R. Co.*, 55 Wash. 633, 104 Pac. 1103.

In this case we cannot hold, as a matter of law, that a reasonably prudent man, in the situation in which the respondent was, would have stopped before at-

tempting to pass over the crossing. In *Pendroy v. Great Northern R. Co.*, 17 N. D. 433, 117 N. W. 531, under facts quite similar to those of the present case, it was held that the question of contributory negligence was for the jury.

The judgment will be affirmed.

HOLCOMB, C. J., TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15224. Department Two. August 15, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRANK PRESTA, *Appellant*.¹

WITNESSES (74, 101) — CROSS-EXAMINATION — TO DISCREDIT CHARACTER WITNESS. In a prosecution for arson, it is error, on cross-examination of character witnesses testifying for the accused, to permit the prosecuting attorney to ask if the witnesses had heard about fires that had destroyed the house in which the accused and his father had lived; the questions not being directed to knowledge of rumors or accusation against the accused or tending to discredit the evidence that his reputation was good.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 8, 1917, upon a trial and conviction of arson. Reversed.

Burcham & Blair, for appellant.

Joseph B. Lindsley, for respondent.

BRIDGES, J.—The appellant was charged with the crime of arson in the second degree. Upon trial he was convicted, and from judgment thereon, appeals to this court.

The appellant put on the witness stand some three or four character witnesses, all of whom testified that his general reputation was good. On cross-examina-

¹Reported in 183 Pac. 112.

Aug. 1919]

Opinion Per BRIDGES, J.

tion of at least two of these witnesses, the prosecuting attorney asked if they had heard about the appellant having had a fire which destroyed the house in which he lived, and also whether they had heard that the house in which the appellant and his father lived had been destroyed by fire. Timely objections to these questions were overruled, and the witnesses answered that they had known of and heard of these several fires. These questions and answers constitute the only question involved in this appeal.

While it is the rule that cross-examination on matters of this kind usually takes a wide range and is very largely in the discretion of the trial court, yet it is manifest that these questions were incompetent; and coming, as they did, from the prosecuting attorney, may well have been highly prejudicial to the appellant. On direct examination the witnesses had testified that the general reputation of the appellant was good, and the cross-examination of them should have been limited to an effort to discredit their testimony. It is certainly proper cross-examination to compel the witness to admit that he has heard rumors of individual acts of the appellant which would tend to show that his reputation in the community was not good.

It has been held that a witness on cross-examination may be asked if the defendant had not before been arrested upon another charge (*McCormick v. State*, 66 Neb. 337, 92 N. W. 606); or if the witness had heard that the defendant had served a term in the penitentiary (*State v. Boyd*, 178 Mo. 2, 76 S. W. 979); or if he had heard of the defendant having been in the penitentiary for cattle stealing (*Holloway v. State*, 45 Tex. Cr. 303, 77 S. W. 14); or if he had heard it reported that the defendant was a gambler (*State v. Thornhill*, 174

Mo. 364, 74 S. W. 832); or if he had heard that the defendant had been guilty of various breaches of the peace and criminal conduct (*State v. Beckner*, 194 Mo. 218, 91 S. W. 892, 3 L. R. A. [N. S.] 535); or if he had heard that defendant had killed a man on another occasion (*Ingram v. State*, 67 Ala. 67); or if he had heard that defendant, on a previous occasion, had committed an assault (*State v. Brown*, 181 Mo. 192, 79 S. W. 1111); or if the defendant had been arrested for disturbing the peace (*People v. Moran*, 144 Cal. 48, 77 Pac. 777); or if he had heard that defendant had drawn a pistol against a third person (*Newton v. Commonwealth*, 31 Ky. Law 327, 102 S. W. 264); or if he had heard of the prisoner getting drunk and carrying concealed weapons (*Carson v. State*, 128 Ala. 58, 29 South. 608).

But the cross-examination here does not come within the rule announced by any of the above mentioned cases, or of any other cases which we have examined. If these witnesses had been asked by the prosecuting attorney whether they had heard that the appellant had been accused of burning his own house or that in which he and his father lived, it is likely that such question would have come within the general rule and been proper, because, if there were any such rumors or accusations against the defendant, the acknowledgment thereof by the witnesses would weaken their previous statements that the reputation of the appellant was good; but here the witnesses were merely asked whether they had not heard that these houses in which the appellant lived had been destroyed by fire. This question did not even tend to show that appellant's reputation was bad. Unquestionably, the great majority of fires are entirely without any criminal fault, and it seems to us that the mere asking of these questions by the prosecuting attorney and the repetition by

Aug. 1919]

Syllabus.

him of them may well have left with the jury the idea that the prosecuting attorney had some inside information concerning these acts. To the questions asked, the witnesses were required to answer that they had heard of these fires. If the witnesses had been asked if they had heard of any one accusing appellant of setting these fires, they would probably have answered in the negative.

For the error pointed out, the case must be reversed and remanded for a new trial.

HOLCOMB, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15331. Department One. August 15, 1919.]

SVEN NELSON, *Appellant*, v. L. M. DAVENPORT,
Respondent.¹

DAMAGES (15, 74) — GROUNDS — LOSS OF PROFITS. Prospective profits can be recovered for the breach of a contract to furnish garbage from defendant's hotel for the fattening of hogs, when proved with reasonable certainty.

SAME (118) — SALES (153) — LOSS OF PROFITS — EVIDENCE — SUFFICIENCY. The prospective profits from a contract to furnish garbage from defendant's hotel for the fattening of hogs for a certain period of time is shown with reasonable certainty by evidence of the plaintiff's profits for preceding months and that there was a dependable market during the term of the contract and that, owing to war conditions during the balance of the term, plaintiff was unable to make a profit with any substitute feed obtainable.

DAMAGES (113) — SALES (152) — LOSS OF PROFITS — EVIDENCE — ADMISSIBILITY. In an action to recover prospective profits from a contract to furnish hotel garbage for fattening stock or feeder hogs, qualified witnesses may testify as to the amount of pork-fat a ton of garbage would produce, that there was a ready market, and feeders easily obtainable, and as to the time it would take on an average to fatten a hog and the expense attached thereto, and the amount of garbage and weight per day taken from defendant's place of business prior to breach of the contract.

¹Reported in 183 Pac. 132.

EVIDENCE (76)—BEST EVIDENCE—LOSS OF WRITING. After proof that written statements of the weight of loads of garbage were lost and could not be produced, parol evidence with reference to the regularity of the weight of the daily loads, and their weight on a number of occasions, is admissible upon an issue as to the daily amount of garbage furnished.

PLEADING (22)—CONCLUSIVENESS OF ALLEGATIONS ON PARTY PLEADING. In an action to recover prospective profits from a contract to furnish hotel garbage for fattening hogs, the defendant cannot claim that the consequences were not within the contemplation of the parties, where his answer admits facts showing notice of the purpose for which the garbage was to be used.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered February 8, 1919, upon granting a nonsuit, dismissing an action on contract. Reversed.

Plummer & Lavin, for appellant.

Wakefield & Witherspoon, for respondent.

MITCHELL, J.—Appellant sued to recover damages for the alleged breach of a contract with respondent for furnishing garbage and refuse from respondent's hotel and restaurant, in Spokane, for appellant's use in feeding hogs. At the close of appellant's evidence, the trial court sustained a challenge to its sufficiency and entered judgment accordingly, from which this appeal has been taken.

The purpose of the action was to recover prospective profits, of which appellant was deprived by respondent's breach of the contract. In order to recover, it is essential to establish the contract and its breach, and then furnish proof within the proper measure of damages. In this case it was admitted there was a written contract between the parties for a period of two years from March 15, 1916, and, if not expressly admitted, there is evidence to show respondent breached the contract on October 10, 1917.

Aug. 1919]

Opinion Per MITCHELL, J.

The real controversy is over the measure of damages, sufficiency of the proof to take the case to the jury, and offers of testimony refused by the trial court. "This court is committed to the doctrine of allowing prospective profits." *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490; *Kopczynski v. Bolcom-Vanderhoof Logging Co.*, 71 Wash. 93, 127 Pac. 601.

There was substantial evidence to show appellant had been in the business of raising or fattening hogs for sale for ten years and, at the time he made this contract, had about one hundred and twenty hogs; that, during the nineteen months the contract was observed, appellant made a net profit of twelve thousand dollars, most of it in the last six months, by the exclusive use of this hog food; that fruitless efforts were made by appellant, upon the breach of the contract, to get the same kind of material elsewhere; that the garbage and refuse from the "Davenport" was the best of that kind of hog food found in the vicinity; that, on account of war conditions, neither grain nor shorts could be had on the market for feeding hogs, and appellant was compelled to use grain already on hand and a small supply of shorts purchased at a distance to take care of the one hundred and twenty-five hogs on hand at the time of the breach of the contract, at such prices and quality of the food compared with that covered by the contract as to deprive him of any profit, and that he was forced out of business; that there was a regular market at which "stock hogs" or "feeders" for fattening could be purchased at prices two cents per pound less than the market price of fattened hogs; that the "feeders" when purchased averaged from one hundred and twenty-five to one hundred and fifty pounds each, and, after a few weeks feeding when ready for sale, would average two hundred and fifty pounds each; that there

was a dependable market during the whole of the remaining five months and five days of the contract for the sale of hogs at sixteen to seventeen cents per pound; that the garbage and refuse from respondent's place of business (which continued to be run by him) during the balance of the term of the contract would have fattened five hundred hogs; that appellant's operating expenses, including the contract price for the garbage and refuse for the remaining five months and five days of the contract, would have been eight hundred and fifteen dollars; that appellant was at all times ready, willing and able to take and pay for the material as provided by the contract; and that, because of the precautions observed and arrangements made, based on experience and information in the business for the last few years, there was no reason for apprehension of disease among the hogs while they were being prepared for market. In much of the testimony appellant was corroborated by well qualified witnesses, some of whom were, and for years had been, engaged in the same kind of business on a large scale in that vicinity, and who testified to market conditions and prices during the five months that appellant was deprived of the fruits of his contract, and also that the material involved in the contract was of the highest quality for the purpose intended.

A litigant is not to be turned out of court because he does not keep a set of books, nor a hog fattener if he fails to record the exact purchase and sale weight of each of his hogs. The theory upon which prospective profits are allowed is that they can be estimated with reasonable certainty. As we said in the *Bogart* case, *supra*, "Such profits do not have to be accurately known. They are to be determined from a consideration of all of the tangible evidence upon the subject."

Aug. 1919]

Opinion Per MITCHELL, J.

Then, after citing and quoting from other cases in this court on the subject, we further said:

“To ascertain the cost of performing any contract so as to arrive at the measure laid down in the above cases, resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions.”

While that was a case of the breach of a contract by which one was prevented from performing work at a stipulated price, the principle involved is applicable here.

The proof in this case possesses a reasonable certainty of a large and substantial loss of profits, sufficient to have taken the case to the jury.

As the case is to be taken back for trial, it is necessary to pass on offers of proof made by appellant which were refused by the trial court. Appellant offered to prove, by his own testimony and that of others well qualified to speak on the subject, the amount of pork-fat a ton of the garbage and refuse would reasonably produce; that, after being fattened, there was a ready market for hogs, without any expense to appellant, during the remaining five months of the contract, and that, during such time, stock hogs or feeders weighing from one hundred to one hundred and fifty pounds each were easily obtainable without expense other than the regular market price; that, on an average, it would require from two to three weeks to add one hundred and fifty pounds to the weight of each hog, and that the amount of hog food produced by respondent during the five months remaining after the breach of the contract would have fattened five hundred hogs, and the expense attached thereto about five hundred dollars. All such offered testimony was, upon the objection of respondent that it was immaterial and speculative, rejected and refused by the court. It

happened that later some of such testimony at the instance of some witness was admitted. We think all of it proper, being of a tangible sort and calculated to assist the jury in arriving at the amount of a verdict if favorable to appellant.

Also the court erroneously sustained an objection to the question asked appellant in his own behalf as to how long, on an average, during the last six months the contract was in force, it took in feeding the material to make a marketable hog out of a stock hog or feeder. Also the number of cans and average weight per day of the garbage and refuse taken from respondent's place under the contract was proper evidence and should have been admitted.

After a witness who hauled the garbage testified with reference to the regularity of weight of the daily hauls just prior to October 10, 1917, and that on a number of occasions he had them weighed, stating the weight, the court struck the testimony out as not being the best evidence, upon discovering that a written statement was furnished each time the load was weighed. Thereupon appellant testified the statements had been lost before trial and that he was unable to produce them; after which the court still refused the testimony as to weights. The ruling was erroneous.

Respondent claims appellant's whole case is at fault for the recovery of prospective profits because there was nothing in the testimony to show, or from which it can be inferred, that the consequences of which appellant complains were within the contemplation of the parties at the time the contract was made. Admit the rule of law to be as counsel contends, his attitude in attempting to apply it to this case overlooks the fact that, in the contract between the parties, which is set out in full in the complaint, there is a provision to the effect that appellant shall use care to discover and

Aug. 1919]

Statement of Case.

return any silver, dishes or wares that he may find in the cans; and in his answer there is a positive allegation of a breach of this provision of the contract, in that, from time to time during the life of the contract, appellant left respondent's silverware in the hog pens to be lost and destroyed, retained it for his own use, or gave it away, and that such conduct came to the knowledge of respondent, who, on several occasions, warned appellant in regard thereto. Under such circumstances, respondent is not in a position to contend he was unaware of appellant's business and its dependence upon the material covered by the contract.

HOLCOMB, C. J., MAIN, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 15347. Department Two. August 15, 1919.]

UMPQUA VALLEY FRUIT UNION, *Respondent*, v. NORTH PACIFIC FRUIT DISTRIBUTORS, *Appellant*.¹

APPEAL (389)—PLEADING (189, 211)—VARIANCE—PREJUDICIAL EFFECT. In an action for the value of fruit shipped by defendant, a variance between an allegation that plaintiff turned over exclusive control of the fruit to defendant and proof that the plaintiff retained control and power of disposition, is not fatal, where defendant was apprised thereof at the beginning of the trial and did not claim surprise or ask a continuance.

CORPORATIONS (17)—EVIDENCE OF EXISTENCE. The existence of a corporation may be shown by parol evidence.

APPEAL (449)—HARMLESS ERROR—EXCLUSION OF EVIDENCE. The exclusion of oral evidence as to the existence of a corporation, while erroneous, is not prejudicial where it was wholly immaterial.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 31, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

¹Reported in 183 Pac. 101.

Hamblen & Gilbert, for appellant.

Chas. P. Lund and Dodds & Dodds, for respondent.

BRIDGES, J.—The respondent sued for damages for the negligent handling by appellant of three carloads of Bartlett pears. The verdict of the jury was for the plaintiff, and the appeal is from the judgment entered thereon. The facts are substantially as follows: the appellant is a Washington corporation; those interested in it and controlling its affairs are as follows: The Wenatchee North Central Fruit Distributors, the Idaho-Oregon Fruit Growers' Association, the Montana Fruit Distributors, and the Western Oregon Fruit Distributors. The subsidiary corporations constituting the appellant were its active agents and exercised extensive powers. In 1917, the appellant, acting through its agent, the Western Oregon Fruit Distributors, solicited and obtained the promise of the business of the respondent for that year. There was an agreement between the parties to the effect that the appellant should first find purchasers in the east for the respondent's fruit, at certain fixed prices, which sale was to be confirmed by the respondent, and the cars of fruit were to be shipped in the name of appellant to the persons to whom sold, and it was to be the appellant's duty to take charge of the shipment and see to the delivery thereof and the collection of all moneys. The appellant maintained a fruit inspection bureau at Chicago, and one of the important features of the contract was that cars of fruit shipped east of Chicago should be carefully examined at that point. If, upon inspection, the fruit appeared to be ripe and would not stand further shipment, the appellant was to notify respondent, who would give further instructions with reference to its disposition. If, for any reason, the purchaser of the fruit refused to take the

same, appellant was required to acquaint respondent with this fact also, so that it could give such instructions as it saw fit. In August, 1917, under this general agreement, three car loads of respondent's Bartlett pears were sold; one car was sold to F. B. Crovo, at Washington, D. C., and was shipped thither, billed in the name of appellant; another car was sold to W. H. Harrison, at Washington, D. C., and was shipped and billed as the first car; the third car was sold to Wignall & Moore Company, at Chicago, and was shipped and billed in the same manner as the other two cars.

It appears that, when the first car reached Chicago, the fruit was inspected and found to be ripe and in no condition to stand the delay of shipment on to Washington. It was in such condition that it should have been disposed of at once on the Chicago market. The appellant did not notify respondent of the condition of the fruit when it reached Chicago, but notwithstanding its ripe condition, permitted it to go forward to Washington. When the car arrived there, the fruit was overripe and the purchaser refused to accept it. Still the appellant did not notify respondent of what had happened at Washington. Instead, it shipped the fruit to Philadelphia, where it was sold at auction, bringing a relatively small price. It appears from the testimony that this fruit could have been sold at Chicago at the time it was there at \$2 per box, and that, had respondent been notified of its condition when it reached Chicago, it would have instructed that the fruit be disposed of there at that price. The second car was also inspected at Chicago, and when it reached Washington the purchaser, W. H. Harrison, refused to take the same unless it was reduced in price twenty-five cents per box. Respondent was not notified of this fact. Appellant caused the car to be shipped to Philadelphia, where the fruit was sold at auction. It appears

that, had the appellant notified respondent that Harrison would take the fruit at the reduced price, respondent would have directed a sale to him at that price. When the third car reached Chicago, its destination, the purchaser refused to take the fruit because a good many boxes of it were undersized. This purchaser, however, agreed to take the fruit, provided it was discounted twenty-five cents per box. The respondent was not notified of this condition or of the prospective sale, and appellant sent the car on to Buffalo to be sold to one of its clients. When the car reached Buffalo, the client would not accept the fruit, and the car was finally landed in Boston, where it was sold at auction. It appears from the testimony that, had the respondent been notified that Wignall & Moore Company would have purchased the fruit in Chicago at a discount of twenty-five cents per box, it would have accepted that offer and directed the sale to be made. The appellant has never paid the respondent anything on account of these three cars of fruit. It appears, however, incidentally, that at one time appellant tendered respondent certain sums, which probably represented all or a portion of the moneys which the fruit brought when sold at auction.

While the appellant does not concede that the facts are as above related, yet the evidence was sufficient to convince the jury, and is sufficient to convince us, that the foregoing statement is correct.

Appellant makes two chief claims of error; one being that there is a fatal variance in the proof from the allegations of the complaint, and the other that in no event, under the testimony, was the respondent's contract made with it, and therefore it could not be liable. Appellant claims that the complaint alleges that these cars of fruit were given over to its exclusive control and disposition, whereas plaintiff's testimony was to

Aug. 1919]

Opinion Per BRIDGES, J.

the effect that, while the actual physical possession of the fruit was turned over to appellant, respondent retained full control and power of disposition, and was to be notified as hereinbefore related. If it should be conceded that there was a variance as claimed, the appellant is in no position to take advantage of it. When counsel for appellant was making his opening statement to the jury, counsel for defendant interposed the following:

"I am going to reserve my statement, and I want to be sure that we understand counsel as to one point that seems to me quite important. Counsel says that in each instance the exclusive control of these cars was retained by the plaintiff, that is, by the Umpqua Valley Fruit Union. In his complaint, for instance, in paragraph 4 of the first cause of action, they say that the plaintiff turned over the exclusive control and delivery of said fruit to said defendant as provided by said agreement. Now, I do not particularly care which theory they adopt, but I want to be sure that they adopt one now and stay by it."

The plaintiff's counsel then stated: "They had no power of disposition of the fruit without notice to the shipper." It would seem, therefore, that, at the very outset of the trial, the appellant knew what the contentions of the respondent would be in these regards, and that the complaint would be considered as amended. Appellant did not claim surprise, nor did it ask for a continuance on account of the alleged variance. We are of the opinion that it is not in any position to complain of any alleged variance.

But it is contended that the testimony shows that the respondent's contract was made with the Western Oregon Fruit Distributors and not with appellant. It would not serve any useful purpose to go particularly into the testimony, which convinces us, and appears to have convinced the jury, that the contract was made

with the appellant. The court by appropriate instructions submitted this exact question to the jury, and in finding for the plaintiff it must have found that the contract was made with the appellant. While practically all of the dealings were had between the respondent and the Western Oregon Fruit Distributors, yet it does not follow that the contract was with the last named concern. The testimony plainly shows that that organization was acting as agent for the appellant, and the latter was bound by its action.

In the course of the defense, the appellant undertook to prove, by the oral testimony of one of its witnesses, that the Western Oregon Fruit Distributors was a corporation. The trial court rejected this testimony on the ground, apparently, that the existence of a corporation could not be proved by parol. Appellant claims that this ruling was erroneous. In this we agree. This court has held in so many cases that the fact of incorporation may be proved by oral testimony that it is not necessary to cite the decisions. However, it did not make the slightest difference whether the Western Oregon Fruit Distributors was a copartnership or a corporation, or any other manner of organization. The testimony sought to be elicited was entirely immaterial. The court might well have sustained the objection on the ground that it was immaterial. Such being the case, the appellant was not injured by the ruling of the court.

As we read the testimony, the appellant's chief defense on the merits was that it had used its best judgment in the handling and disposition of respondent's fruit, but made very little effort to show that it had notified respondent of the various troubles that fruit had gotten into at Chicago and Washington. Evidently, the jury believed that the respondent was entitled to this notice. All these questions were properly

Aug. 1919]

Opinion Per MITCHELL, J.

submitted to the jury under correct instructions, and we are bound by its verdict.

We find no error in the record, and the judgment is affirmed.

HOLCOMB, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15311. Department One. August 18, 1919.]

B. BERNSTEIN *et al.*, as *Astoria Junk Company*, Respondents, v. FRANK SCHWARTZ, as *Alaska Junk Company*, Appellant.¹

PRINCIPAL AND AGENT (6)—EVIDENCE OF AGENCY—ADMISSIBILITY. Where there was no proof that an agent had made a contract to buy certain junk, or had authority to do so, it is not error to exclude evidence of agency generally.

SAME (39)—EVIDENCE AS TO AUTHORITY—ADMISSIBILITY. Upon an issue as to an agent's authority to buy junk for defendant, a special agency to make contracts with another particular person is immaterial.

SAME (37)—POWERS—COLLECTING AGENT—POWER TO MODIFY. A collecting agent presumptively has no authority to rescind a contract, and where he was advised by wire not to do so, the jury is properly instructed that, as a matter of law, he had no power to modify the contract.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 5, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Reynolds & Harroun, for appellant.

Jones & Riddell, for respondent.

MITCHELL, J.—The Alaska Junk Company, through its agent, purchased from the Astoria Junk Company one hundred and fifty tons of mixed scrap iron, at

¹Reported in 183 Pac. 105.

Astoria, Oregon, upon a personal examination of it by the agent. Later the contract was reduced to writing and signed by both parties in Seattle. After partial delivery and part payment, the purchaser refused to further carry out the contract, and this suit was brought to recover damages for its breach. The Alaska Junk Company defended, relying on an alleged modification of the contract to the prejudice of plaintiff's rights. Plaintiff denied the contract had been modified. There was a jury trial, resulting in a judgment in favor of plaintiff, from which judgment the defendant has appealed.

There are seven assignments of error. Assignments numbered 1 and 2 refer to the signing and entry of judgment and denying a motion for a new trial, and are controlled by the disposition made of the other assignments. Assignments numbered 3, 4 and 5 relate to the alleged modified contract, claimed by appellant to have been signed for respondent by S. E. Mesher, unsuccessfully offered in evidence, and the question of the agency of Mesher in connection therewith. Mesher was not a witness at the trial. There is no proof that he ever acted with any authority in any dealing between the parties to this suit up to and including the making of the contract. The so-called modified contract has the purported signature of respondent by Mesher. Upon identification of it by appellant, it was offered in evidence and properly refused until the agency of Mesher was shown. Attempt was made to show such agency in a general way, and also by a peculiar circumstance.

It is clear the original contract, which was made in duplicate, was not signed at all by respondent on the duplicate kept by appellant, and later when Mesher, as collecting agent for respondent, received a payment on the contract, he signed a receipt therefor, written

Aug. 1919]

Opinion Per MITCHELL, J.

on the duplicate held by appellant in such way and place that at the trial appellant attempted, with poor grace and manifest hedging, to say that the signature of S. E. Mesher was to the contract as such, although the same witness otherwise testified he did not remember if Mesher was present on the day the contract was made and signed; and a number of other witnesses—indeed, all others on both sides who testified on the subject at all—said either that Mesher was in Oregon on that day or that they did not remember his being present at the time the contract was signed. At the conclusion of all the evidence on this particular point—in fact, at the conclusion of all the evidence in the case, the trial judge, referring to such signature of Mesher under the receipt written on the duplicate contract held by appellant, remarked: “It is not signed as a contract. He put his signature not to the contract. He put his signature to the receipt at the bottom, as a receipt for four hundred dollars,” to which ruling counsel for appellant not only did not take any exception, but said: “That is a matter of course;” but still claimed there was a showing generally of the agency of Mesher to make a modified contract. Thus having failed to show that Mesher, as agent, had signed the contract, it is contended the court erroneously excluded evidence tending to show agency generally. In this respect, after appellant’s manager had testified that salesmen for different junk houses had authority to draw up and enter into contracts, appellant’s attorney—not its present attorneys, however—(in the absence of any proof that Mesher had ever acted as a salesman for respondent) commenced a question, “And if S. E. Mesher was a salesman for the Astoria Junk Company—” at which juncture an objection was made that it was immaterial, the question being what was done in this particular case, and that the witness had

already testified he could not say if Mesher had authority to enter into a contract for his house. The objection was properly sustained. Further, in this regard, appellant attempted to show, by an officer of the Northwest Junk Company, that it had made contracts with this respondent through Mesher. The attempt and character of the agency were narrowed as indicated by an offer to show that Mesher had made contracts with the Northwest Junk Company, and that it was customarily understood in the trade that he was competent to make contracts with the Northwest Junk Company. It was unimportant in the present case to show a special agency to make contracts with another particular person.

The sixth assignment of error refers to an instruction given the jury. It is claimed the court erroneously advised, as a matter of law, that Mesher had no authority to make any modified contract for the Astoria Junk Company. Upon the whole record, we think the instruction was clearly right. The attempt of appellant to show that Mesher had authority to make a contract for respondent had wholly failed, and besides, presumptively, an agent employed to make contracts has no power to rescind them. His duty is to acquire interests, not to give them away; nor has he any implied power to waive or give up rights or interests of his principal. 31 Cyc. 1387. In this case, Mesher was only a collection agent of respondent, and called upon appellant for that purpose. In the course of delivery of the goods from Astoria, Oregon, to Seattle, a presidential proclamation had ordered an embargo upon the export of scrap iron which greatly reduced its market value. Appellant refused to pay for a car of the iron shipped, and Mesher was sent to make collection. On reaching Seattle, appellant insisted on a cancellation or modification of the contract, claiming the goods were unsatis-

Aug. 1919]

Opinion Per MITCHELL, J.

factory. Mesher wired for advice, and received a reply from respondent not to cancel the contract, but to tell the Alaska Junk Company they would be held to their contract and that remaining cars would be shipped within the specified time. At the trial, this dispatch of respondent's was admitted in evidence with the consent of appellant's counsel. It was after the receipt of the telegram by Mesher that the so-called modified contract was made. Obviously, the trial court was right, under all the circumstances and evidence, in giving the instructions now complained of.

The seventh assignment of error refers to the refusal of the court to give a requested instruction permitting the jury to determine if there was a modification of the contract that was binding upon respondent. What we have just said concerning the sixth assignment of error disposes of this adversely to appellant.

As to the quality of the goods, part of which was delivered and others tendered, although there was some testimony on behalf of appellant that they were not up to grade, respondent's proof was that they were the particular goods examined by and sold to appellant. The matter of the quality or identity of the goods and of the account between the parties were questions of fact for the jury, whose verdict is supported by ample proof.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and TOLMAN, JJ., concur.

[No. 15335. Department Two. August 18, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES A.
DONOVAN, *Appellant*.¹

LARCENY (2)—PROPERTY SUBJECT—OUTLAWED WHISKEY. Whiskey, although outlawed and unlawfully held by one whose possession the law did not protect, may be the subject of larceny.

SAME (6)—INFORMATION—SUFFICIENCY. An information for the larceny of whiskey which alleged that it was taken by the "trick and device" of defendant's appearing as a police officer, does not show on its face that it was taken into the custody of the law.

SAME (34)—TRIAL—INSTRUCTION. In a prosecution for larceny, an instruction as to the value necessary to constitute grand larceny is not prejudicial in failing to state all the elements of the offense, where such elements were stated in other instructions.

SAME (3, 10) — FRAUD OR APPROPRIATION — INFORMATION — SUFFICIENCY. An information for the larceny of whiskey charging that defendant obtained it by the "trick and device" of appearing as a police officer, and so having obtained it, did feloniously take and appropriate it to his own use, sufficiently charges the act of taking and appropriation as one continuous transaction, and is therefore not confined to larceny by embezzlement by a public officer as defined in Rem. Code, § 2601, subd. 3.

SAME (34)—TRIAL—INSTRUCTIONS. Under such an information, instructions submitting the question of guilt in the original taking, and in appropriating it to his own use following the original taking, are proper, since these two theories of guilt are not inconsistent.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered January 28, 1919, upon a trial and conviction of grand larceny. Affirmed.

Mulligan & Bradsley and *Robertson & Müller*, for appellant, contended, among other things, that whiskey is not property under our prohibition law. *Delaney v. Plunket*, 146 Ga. 547, 91 S. E. 561, Ann. Cas. 1917E 685, L. R. A. 1917D 926; *Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. 352; *State v. Great Northern R. Co.*, 101 Wash. 464, 172 Pac. 546; *State v. Twenty*

¹Reported in 183 Pac. 127.

Aug. 1919]

Citations of Counsel.

Barrels of Whiskey, 104 Wash. 382, 176 Pac. 673; *Lawton v. Steele*, 152 U. S. 133; *Mugler v. Kansas*, 123 U. S. 623; *Mullen v. Mosely*, 13 Idaho 457, 90 Pac. 986, 121 Am. St. 277, 12 L. R. A. (N. S.) 394; *Oviatt v. Pond*, 29 Conn. 479; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719; *McCord v. People*, 46 N. Y. 470.

To be property, it must have a market value (Rem. Code, § 2606), which means a value on the open market. 18 Am. & Eng. Ency. Law (2d ed.), 467; 19 Am. & Eng. Ency. Law (2d ed.), 1153, 1154; *State v. Doeppke*, 68 Mo. 208, 30 Am. Rep. 785.

Contraband or outlawed property cannot be the subject of legal ownership. *State v. Great Northern R. Co.*, 101 Wash. 464, 172 Pac. 546; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719; *Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. 852; *Mugler v. Kansas*, 123 U. S. 623; *Delaney v. Plunkett*, 146 Ga. 547, 91 S. E. 561, Ann. Cas. 1917E 685, L. R. A. 1917D 926; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; *McCord v. People*, 46 N. Y. 470; *People v. Stetson*, 4 Barb. (N. Y.) 151.

The information is insufficient in charging the appropriation of more than 175 pint bottles of whiskey of the value of more than \$400. Wharton, Criminal Law, § 880; *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. 152; *State v. Brew*, 4 Wash. 95, 29 Pac. 762, 31 Am. St. 904; *Hope v. Commonwealth*, 9 Metc. (Mass.) 134; *People v. Coon*, 45 Cal. 672; *State v. Holmes*, 9 Wash. 528, 37 Pac. 283; *Patrick v. State*, 50 Tex. Cr. 496, 98 S. W. 840, 123 Am. St. 861.

Under the facts, the whiskey was in *custodia legis*. 25 Am. & Eng. Ency. Law (2d ed.), 153; *Allen v. Staples*, 6 Gray (Mass.) 491; *Smith v. Huntington*, 3 N. H. 76, 14 Am. Dec. 331.

So that any charge of larceny is of larceny by embezzlement under Rem. Code, § 2601, subd. 3. *State v.*

Ward, 96 Wash. 550, 165 Pac. 794; *State v. Rolette*, 94 Wash. 94, 161 Pac. 1042.

The information therefore is not direct and certain. 1 Wharton, Criminal Evidence, § 92; 13 Ency. Evidence, 640; *State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Morgan*, 21 Wash. 355, 58 Pac. 215; *State v. Diamond Ice & Storage Co.*, 105 Wash. 122, 177 Pac. 634.

When a general charge may be divided into two propositions, if either, separated, is not applicable to the evidence or the propositions are conflicting, the charge is erroneous. 12 Cyc. 649; *State v. Peasley*, 80 Wash. 99, 141 Pac. 316; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. 450; *State v. Ardoin*, 49 La. Ann. 1145, 22 South. 620, 62 Am. St. 678; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. 529.

This instruction authorized a conviction if accused "obtained" the property, and this is not sufficient. *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *Taylor v. State*, 50 Tex. Cr. 377, 97 S. W. 473; *State v. McDonald*, 133 N. C. 680, 45 S. E. 582; *State v. Moore*, 57 W. Va. 146, 49 S. E. 1015; *Robinson v. State*, 109 Ga. 564, 35 S. E. 57, 77 Am. St. 392; *State v. Reilly*, 4 Mo. App. 392.

The giving of an instruction not applicable to the facts in the case is prejudicial error. 14 R. C. L. 784; 12 Cyc. 651; *State v. Jones*, 3 Wash. 175, 28 Pac. 254; *State v. Ward*, 96 Wash. 550, 165 Pac. 794; *Conley v. Greene*, 89 Wash. 39, 153 Pac. 1089; *State v. Peasley*, 80 Wash. 99, 141 Pac. 316.

If conflicting and irreconcilable, the charge is erroneous. 12 Cyc. 649; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. 450; *State v. Ardoin*, 49 La. Ann. 1145, 22

Aug. 1919]

Citations of Counsel.

South. 620, 62 Am. St. 678; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. 529.

The instruction is insufficient in failing to use the term "deprive or defraud" or "wrongfully" or equivalent terms. *State v. Ward*, 96 Wash. 550, 165 Pac. 794; *State v. Ames*, 119 Iowa 680, 94 N. W. 231; *Hamilton v. State*, 46 Neb. 284, 64 N. W. 965; *State v. Carmean*, 126 Iowa 291, 102 N. W. 97, 106 Am. St. 352.

Donovan's offense, under the facts, was nothing more than misconduct as an officer, not larceny by embezzlement. *Mitchell v. Territory*, 7 Okl. 527, 54 Pac. 782; *People v. Stewart*, 80 Cal. 129, 22 Pac. 124; *Bailey v. State*, 92 Ark. 216, 122 S. W. 497; *Eilers v. State*, 34 Tex. Cr. 344, 30 S. W. 811.

Joseph B. Lindsley, for respondent, contended, among other things, that accused was guilty of larceny. *State v. Skilbrick*, 25 Wash. 555, 66 Pac. 53, 87 Am. St. 784; *State v. Ryan*, 47 Ore. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862; *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *Stinson v. People*, 43 Ill. 397; *Doss v. People*, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. 180; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372.

Whiskey, although contraband, is the subject of larceny. *State v. May*, 20 Iowa 305; *Commonwealth v. Coffee*, 9 Gray (Mass.) 139; *Kreiter v. Nichols*, 28 Mich. 495; *Bales v. State*, 3 W. Va. 685.

It is not necessary that it have a market value. 2 Bishop, New Criminal Law, paragraphs 359, 781; *Rex v. Clark*, 2 Leach (C. C.) 1036; *State v. Allen*, R. M. Charlt. (Ga.) 518; *Commonwealth v. Riggs*, 14 Gray (Mass.) 376, 77 Am. Dec. 333; *Commonwealth v. Lawless*, 103 Mass. 425; *Wolverton v. Commonwealth*, 75 Va. 909; *Commonwealth v. Smith*, 129 Mass. 104; *Commonwealth v. Cooper*, 130 Mass. 285.

PARKER, J.—The defendant, Donovan, was jointly charged with the commission of the crime of grand larceny with one Whalen, by information filed in the superior court for Spokane county, which information charged the commission of the crime as follows:

“The said defendants, James A. Donovan and J. T. Whalen, on or about the twenty-first day of September, 1918, in the county of Spokane, state of Washington, then and there being, and having then and there taken into their possession from one J. L. Smith more than 175 pint bottles of whiskey, the property of and belonging to said J. L. Smith, by the trick and device of the defendant James A. Donovan then appearing as a police officer of the city of Spokane, with authority, as such officer, to seize such whiskey from said J. L. Smith, the said J. T. Whalen then and there accompanying the said James A. Donovan and confederating with him, and so having obtained and taken into their possession the said whiskey, did then and there wilfully, unlawfully and feloniously take, carry away, conceal, and appropriate to their own use the said whiskey, consisting of more than 175 pint bottles filled with whiskey, the property of and belonging to J. L. Smith, of the value of more than \$400, with the intent to deprive and defraud the owner thereof.”

Donovan's trial in that court sitting with a jury resulted in a verdict of guilty as charged, upon which judgment was rendered against him, from which judgment he has appealed to this court.

The first contention made by counsel for Donovan is that the information fails to charge him with the commission of any crime under the laws of this state. The principal argument made in that behalf is, in substance, that the information charges facts showing that the whiskey alleged to have been stolen was at the time outlawed property the ownership of which the law did not protect, and therefore was not the subject of larceny. It may be conceded that the facts

Aug. 1919]

Opinion Per PARKER, J.

charged show the outlawed character of the whiskey as property, and that, in so far as any claim of property therein is concerned, the law would not afford any one making such claim any relief looking to its recovery, or damages for its taking. We think, however, that the question of whether or not the whiskey was subject to larceny, by the taking of it from the one who was in possession and claiming to be the owner of it, is quite a different question.

In *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397, which seems to have become a leading case in this country, Justice Cushing, speaking for the court, having under consideration the question of whether or not an indictment could be sustained for the larceny of money which had been received by one from whom it had been stolen for the sale of intoxicating liquor in violation of law, said:

"It has been very ingeniously argued by the defendant's counsel, that money, so obtained, is destitute of the rights of property, and being thus in a manner outlawed, is not entitled to legal protection, and is incapable of being the subject-matter of larceny; in a word, that it may be stolen with absolute impunity . . .

"We apprehend it would be no answer to an indictment for larceny properly drawn, to say that the object larceniously taken, belonged to nobody, provided the thing were in its nature property; 2 East, P. C. 606; 2 Russ. on Crimes, (6th Am. ed.) 96; or that it belonged to some unknown owner; for then, by force of the statute, and by common law too, it would be protected in the hands of the possessor. But it is further contended, that such possessor must be a lawful possessor; nay, if he be proved owner against all the world, yet, if the property be acquired by breach of law, the law will in no respect exert itself to aid the guilty party to retain the possession, or to regain it when lost. This position is advanced on the strength of the case of *Gregg v. Wyman*, 4 Cush. 322, and other cases of the

same class, in which it has been adjudged as a doctrine of the common law, that courts of justice will not afford their assistance for the enforcement of any contract based on a criminal or unlawful undertaking or act.

"We fully recognize the soundness of this doctrine, supported as it is by obvious considerations of public policy and justice. But the inference, deduced therefrom in argument, by no means follows. That same common law, which, in its integrity and wisdom, refuses to lend itself to be the instrument, even indirectly, for the execution of a criminal contract, will as little condescend to throw its mantle over crime itself. The law punishes larceny, because it is larceny; . . . And the law punishes the larceny of property, not solely because of any rights of the proprietor, but also because of its own inherent legal rights as property; and, therefore, even he, who larceniously takes the stolen object from a thief whose hands have but just closed upon it, may himself be convicted therefor, in spite of the criminality of the possession of his immediate predecessor in crime. This principle is coeval with the common law itself as a collection of received opinions and rules, for we have to go back to the Year-Books to find its first judicial announcement."

And then, following a review of English and American decisions, the learned justice concluded as follows:

"We think it is well established at common law, therefore, that property, though unlawfully acquired, may nevertheless be the subject-matter of larceny; and we think the cases decided are broad enough to cover the present or any similar form of unlawful acquisition."

It is true that was the larceny of money which had been received by one from whom it was taken for the sale of outlawed liquor, and that the money as such, apart from its being so acquired by the one from whom it was taken, of course was not outlawed property. Upon the law as announced in that decision, however,

Aug. 1919]

Opinion Per PARKER, J.

the same court, in the later case of *Commonwealth v. Coffee*, 9 Gray (Mass.) 139, held that intoxicating liquor, though unlawfully held by the one in possession thereof, so that the law would not lend its protection to his property right therein, was a subject of larceny.

In *Bales v. State*, 3 W. Va. 685, there was involved the larceny of certain ivory checks used for gambling purposes, the property right in which was plainly outlawed. Answering the contention that such checks were not the subject of larceny, the court very pertinently observed:

“The important question therefore is, whether these checks, kept and used for gambling contrary to the statute, can be the subject of larceny? That they could not have been recovered by action, is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles. And the case of *Spaulding v. Preston*, 21 Vt. 10, is directly in point. But still, the question recurs, whether larceny can be committed of such prohibited things. And, to hold that it could not, would be to run the hazard of encouraging larceny by discouraging gaming.

“The law punishes gaming and the keeping for gaming purposes articles of like character with those mentioned, and provides the mode of seizing and destroying them by the hand of an officer and the order of the magistrate. And it is perhaps more politic that resort be had to the mode prescribed by law for that purpose, than to encourage a resort to theft for discouraging gambling. The cases cited from Massachusetts, where the subject was twice fully considered, take this view of it. *Commonwealth v. Coffee*, 9 Gray, 137; *Com. v. Rourke*, 10 Cush., 397; . . .”

It is worthy of note that the court rested its decision upon the two Massachusetts cases above noticed. Among other decisions to the same effect we note: *Commonwealth v. Smith*, 129 Mass. 104, and *State v. May*, 20 Iowa 305; the latter involving the theft of out-

lawed intoxicating liquor. We are quite convinced that the information in this case does not fail to state an offense under our laws because of the fact that upon its face it appears to charge the larceny of outlawed intoxicating liquor.

Further contention is made that the information failed to charge a larceny of Smith's whiskey, because it appears upon the face of the information that the whiskey was taken into the custody of the law when taken by Donovan. Whether or not the whiskey was then taken into the custody of the law, we think, depends upon the intent with which Donovan took it from Smith. We think it plain that the language of the information means that Donovan took the whiskey, not in good faith as a public officer, but with intent to appropriate it to his own use. Otherwise the allegation that he took it by "the trick and device" of appearing as a police officer would be meaningless. We think the information does not show upon its face that the liquor was taken into the custody of the law; but that the facts therein alleged show to the contrary. But, in any event, we think it would be subject to larceny as Smith's whiskey until lawfully ordered to be destroyed.

Among other instructions given to the jury by the trial court was the following:

"Under the law of the state of Washington grand larceny is substantially defined as follows: Every person who, with intent to deprive or defraud the owner thereof, shall steal or obtain property of another of the value of more than \$25 shall be guilty of the crime of grand larceny."

It is contended that this was erroneous to the prejudice of Donovan because it did not contain a statement of all of the elements of the larceny with which he was charged. We think it is plain that other instructions

Aug. 1919]

Opinion Per PARKER, J.

given by the court to the jury did fully inform the jury as to all the elements of larceny as charged in the information. This instruction manifestly was given merely to inform the jury that, in order to find Donovan guilty of grand larceny, they must find that he took property of the value of more than twenty-five dollars. Rem. Code, § 2605. No prejudicial error resulted to Donovan by the giving of this instruction, especially in view of the other instructions which were given.

Certain instructions given by the court told the jury, in substance, that Donovan could be found guilty under the charge of the information if he took the whiskey with intent to deprive the owner thereof and appropriate it to his own use, or if he seized the whiskey in good faith as an officer of the law and then appropriated it to his own use, meaning, manifestly, appropriating it to his own use before the making of any lawful order for its destruction. This, it is contended, was error prejudicial to Donovan. Section 2601, Rem. Code, defining larceny and the several ways in which it may be committed, reads, in so far as we need here notice its language, as follows:

“Every person who, with intent to deprive or defraud the owner thereof—

“(1) Shall take, lead or drive away the property of another; or

“(2) Shall obtain from the owner or another the possession of or title to any property, . . . by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or

“(3) Having any property in his possession, custody or control, . . . as a public officer . . . or by competent authority to take or hold such possession, custody or control, . . . shall secrete, withhold or appropriate the same to his own use or to the

use of any person other than the true owner or person entitled thereto; . . .

"Steals such property and shall be guilty of larceny."

The argument seems to be that the information charges larceny by embezzlement only, under subdv. 3 of this section, and that, therefore, the question of Donovan being guilty of larceny in the original taking of the whiskey should not have been submitted to the jury. The information, as we view it, in effect charges the original taking of the whiskey by Donovan and its appropriation to his own use with intent to deprive Smith, the owner thereof, of it as occurring at the same time, or at least that the act of taking and appropriation followed in such close relationship as to constitute one continuous transaction in so far as Donovan's criminal intent was concerned. There was ample evidence to support this view of the facts. It is not claimed that the information charges more than one crime, and we think it could not be successfully so argued. We think that these instructions did not erroneously submit to the jury both the question of Donovan's being guilty of larceny in the original taking of the whiskey and the question of his guilt in appropriating it to his own use following the original taking; nor are these two theories of his guilt inconsistent.

Certain instructions requested by counsel for Donovan to be given were refused by the court to be given. As to the errors claimed in the refusal of the court to give such instructions, we think they are sufficiently disposed of by what we have already said touching the question of the whiskey being subject to larceny, since the requested instructions touch that question only, in so far as we regard these assigned errors worthy of serious consideration here.

Aug. 1919]

Statement of Case.

We have examined other claims of error made in behalf of Donovan, but think it sufficient to say that we regard them as without merit. A painstaking examination of this record convinces us that Donovan has had a fair trial, and that the judgment of conviction must be affirmed. It is so ordered.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

[No. 15425. Department Two. August 18, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
ETHEL G. WHALEN, *Appellant*,
JAMES A. DONOVAN *et al.*,
Defendants.¹

BAIL (6)—DISCHARGE. Forfeiture of a bail bond cannot be defeated for duress and want of consideration, where the information under which the principal was arrested and held charged a crime and he was not entitled to discharge without trial.

WITNESSES (96)—PRIVILEGE—WAIVER. Rem. Code, § 6262-13, providing that no person shall be prosecuted on account of any transaction concerning which he shall be compelled to testify, does not render a witness immune from prosecution where he testified voluntarily and made no claim of privilege; and in such case, sureties on his bail bond cannot claim the privilege to evade forfeiture of the bond.

Appeal from an order of the superior court for Spokane county, Webster, J., entered January 28, 1919, forfeiting the bail of a defendant charged with larceny. Affirmed.

Robertson & Miller and Mulligan & Bardsley, for appellant.

Joseph B. Lindsley, for respondent.

¹Reported in 183 Pac. 130.

MOUNT, J.—This is an appeal from an order forfeiting the bail of J. T. Whalen.

The facts are not disputed. They are as follows: One James A. Donovan was charged in the justice court with unlawfully having in his possession one hundred and seventy-five pints of whiskey with intent to sell the same. When that case was tried before the justice of the peace, J. T. Whalen was subpoenaed as a witness on behalf of the state and testified therein voluntarily without claiming any privilege or immunity. After that trial, the prosecuting attorney filed an information in the superior court, charging both Donovan and Whalen jointly with the larceny of the one hundred and seventy-five pints of whiskey. Whalen was arrested and placed in jail. His bail was fixed at two thousand dollars, and the appellant, Ethel G. Whalen, supplied the bail by depositing in her own name two thousand dollars cash. Whalen was thereupon released. Thereafter he filed his plea in the superior court, claiming exemption and immunity from prosecution because of the testimony which he had given upon the trial of James A. Donovan in the justice court. The prosecuting attorney filed a replication to the plea and set up a transcript of the evidence given before the justice of the peace; and, upon a hearing of this plea, the superior court denied the plea and the case was set for trial before a jury on the 13th day of January, 1919. Mr. Whalen did not appear for the trial, and the prosecuting attorney moved the court to forfeit the bail deposited by the appellant. Objections were made to this motion by counsel for Ethel G. Whalen, because it was claimed the information did not charge a crime against Whalen, that Whalen was immune from prosecution, and that the bond was without consideration and given under

Aug. 1919]

Opinion Per MOUNT, J.

duress. These objections were denied and the bail was forfeited.

Ethel G. Whalen appeals from that order and makes the same contentions here that were made to the lower court at the hearing upon the motion for the forfeiture of the bail. The contention that the bond was without consideration and given under duress is based upon the contention that the information does not charge a crime against Whalen. We have held in the case of *State v. Donovan*, ante p. 276, 183 Pac. 127, that this particular information does charge a crime. The case of *State v. Lewis*, 35 Wash. 261, 77 Pac. 198, was a case where we held that sureties upon a bail bond were released because Lewis in that case was entitled to be discharged without trial. In the case of *State ex rel. Grass v. White*, 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563, we held that cash deposited in lieu of bail could not be forfeited where the party was arrested without authority of law or any charge being made against him, and that he was entitled to his discharge as a matter of right. Those two cases, relied upon by the appellant, have no application to this case, because here the information charges a crime and the defendant was, therefore, not entitled to discharge without trial.

Appellant also argues that Mr. Whalen was immune from prosecution, even if the information does charge a crime, and bases this contention upon the statute, which is as follows:

“In any action or proceeding under this act or under any other law relating to the unlawful disposition or possession of intoxicating liquor, no person shall be excused from testifying in any court or before any grand jury, on the ground that his testimony may incriminate him, but no person shall be prosecuted or

punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor, under the laws of this state." Laws of 1915, ch. 2, p. 9, § 13 (Rem. Code, § 6262-13).

This statute is plain to the effect that no person shall be excused from testifying in any court on the ground that his testimony may incriminate him, but such person shall not be punished on account of any transaction concerning which he shall be compelled to testify. Appellant argues that, under this section, Mr. Whalen was immune from prosecution because he testified in a justice of the peace court concerning the possession of this same liquor which he is charged in this action with having stolen. Appellant relies upon the case of *Brown v. Walker*, 161 U. S. 591, and the cases therein cited, particularly *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 43 Am. St. 127, 26 L. R. A. 423. These cases were both cases where the accused parties had claimed their privilege and had been compelled to testify by an order of court. The record is plain in this case that Mr. Whalen testified voluntarily. He made no claim of privilege upon the ground that his testimony might incriminate him, or upon any other ground. In short, he was not compelled to testify, and we are of the opinion that he cannot now claim the immunity provided for in that statute. The statute is specific that he must be *compelled* to testify. If the statute intended that a person shall be immune from punishment when he shall testify, the word "compelled" is entirely superfluous. We must assume that the legislature, in passing this act, meant what it said. The great weight of authority is to the effect that a person may waive his privilege, and, when he does so, he cannot thereafter claim it. *State v. Murphy*, 128 Wis. 201, 107

Aug. 1919]

Opinion Per MOUNT, J.

N. W. 470; *Scribner v. State*, 9 Okl. Cr. 465, 132 Pac. 933, Ann. Cas. 1915B 381; *Tague v. State*, 174 Pac. (Okl.) 1106; *State v. Sureties of Krohne*, 4 Wyo. 347, 34 Pac. 3.

In the case of *Scribner v. State*, *supra*, many authorities are collected and discussed, and the court there said, upon this point, at page 484:

“A witness cannot voluntarily answer such questions and at the same time claim the immunity granted. It cannot be logically said that a right can be waived and asserted by the same act. In other words, compulsion is a condition precedent for immunity.”

It is plain, therefore, that, since Mr. Whalen at the time he testified did so voluntarily without claiming his privilege, and since he was not compelled to testify, he cannot now claim the privilege. Nor can his sureties claim it for him. *State v. Sureties of Krohne*, *supra*.

Since the information states a crime against Mr. Whalen, and since he failed to appear at his trial which was set for a given date, the trial court properly forfeited the bail.

The order appealed from must therefore be affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and BRIDGES, JJ., concur.

[Nos. 15341, 15342, 15343. Department Two. August 18, 1919.]

THE STATE OF WASHINGTON, *on the Relation of W. H. McKee et al., Plaintiff*, v. CLARK V. SAVIDGE,
as Commissioner of Public Lands,
Respondent.

THE STATE OF WASHINGTON, *on the Relation of Addison Shoudy, Plaintiff*, v. CLARK V. SAVIDGE, *as Commissioner of Public Lands,*
*Respondent.*¹

PUBLIC LANDS (75-83) — DISPOSAL OF GRANTED LANDS — GRAZING LEASE—POWERS OF COMMISSIONER. Subject to the Congressional restriction that no more than one section of grazing land be leased to one person, the commissioner of public lands may lease granted lands to the highest bidder, under Rem. Code, § 6681, or exercise his discretion in rejecting all bids under § 6688.

SAME (75-83). Under Rem. Code, § 6612, authorizing the commissioner of public lands to review and reconsider his public acts, and Id., § 6616, providing for an appeal to the supreme court, the commissioner of public lands acts within his powers and discretion in letting grazing leases of less than one section to the highest bidders who are apparently qualified, and cannot be mandamused at the suit of other bidders who made no demand for a hearing or offer to prove that the highest bidders were disqualified.

Applications filed in the supreme court April 19, 1919, for writs of mandamus to compel the state land commissioner to issue leases for certain state grazing lands. Denied.

Ralph Kauffman, for relators.

The Attorney General and *Jno. A. Homer*, Assistant,
for respondent.

HOLCOMB, C. J.—These three applications made to this court were consolidated for hearing and determination.

¹Reported in 183 Pac. 111.

Aug. 1919]

Opinion Per HOLCOMB, C. J.

Each relator seeks a writ of mandate to compel the state land commissioner to issue to him a lease covering certain state grazing lands in Kittitas county. Demurrers were interposed to the applications and motions were made in each case objecting to the jurisdiction of the court to grant the relief sought. Answers or affidavits were also filed at the same time showing the acts and contemplated acts of the commissioner in the premises.

A summary of the facts in the petitions in each case upon which relators rely for the issuance of the leases to them is as follows:

On March 15, 1919, the auditor of Kittitas county, by direction of respondent, invited bids for lease of certain school indemnity land of the state, known as "grazing land." At the public leasing of the three tracts of land involved herein, the auditor announced that the highest and best offer in each instance was that of a party whose bid exceeded that of relator, and that the lands would be leased to such successful bidders, subject to the approval of the respondent. It is averred that the successful bidder on each tract of land was represented by an attorney who pretended to act for said bidder, but who was, in fact, bidding either for a gas and water company or for a certain copartnership engaged in the sheep growing business, or for both of them; that the successful bidder owns no live stock; that he had an agreement to hold the legal title to the land for the benefit of the parties (or would assign to them his lease when executed), for whom it is alleged the attorney in reality acted, and that this is in contravention of the terms of the act of the United States Congress granting the lands to this state, the real parties in interest having previously obtained the full beneficial interest in leases to grazing land in excess of one section.

Respondent's affidavit sets up facts constituting compliance with the statute governing leases of grazing lands of the state—notice of public auction of leases, accepted bid highest offered, payment of first year's rental thereunder, and that no lease of public lands of the state which is now in force has been issued to such bidder. Respondent contends that § 6681, Rem. Code, requires leasing of land of the character of that in controversy to the highest bidder at public auction; that it appears from the return of the county auditor that the party to whom the lease will issue was the highest bidder.

The enabling act of Congress, granting these lands to the state of Washington, in § 11 thereof provided:

“Said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company.”

While not part of the statutory regulations of the legislature of Washington, the above restriction by Congress must govern the state commissioner of public lands in leasing such granted lands.

But while so restricted, the commissioner is nevertheless entitled to the presumption that he exercises his powers and performs his duties according to law, unless the contrary manifestly appears.

So far as the returns to the commissioner show, the highest bidder at the public exposal of the lands involved in each instance herein is a person entitled to acceptance as such bidder and to receive the lease, and not a person having such granted lands leased as, with those here involved, would render such bidder a lessee of more than one section of such lands.

Section 6688, Rem. Code, provides that “the commissioner of public lands or the auditor may reject any and all bids [for such lease] when the interests

Aug. 1919]

Opinion Per HOLCOMB, C. J.

of the state shall justify it." This empowers those officers to reject the bid of any person or company when the acceptance thereof would result in the leasing of more than one section of such granted lands to any one person or company. The officers are thus granted discretion relating to such matters, which, however, they may not abuse, or accept or reject such bids arbitrarily.

Another statutory provision (Rem. Code, § 6612) authorizes "the board of state land commissioners or the commissioner of public lands to review and reconsider any of their official acts relating to the public lands until such time as a lease, contract or deed shall have been made, executed and finally issued." And another (Rem. Code, § 6616) provides for an appeal to the superior court of the county in which such lands are situated, from any order or decision of the board of state land commissioners relating to same, by the party feeling aggrieved thereby.

While these relators made formal protest in writing to the commissioner, it does not appear that any demand for a hearing and offer to prove the allegations of the relators was made to the commissioner or board of state land commissioners and denied. There is no specific statutory provision for such hearing other than those hereinbefore cited, and the power granted by Rem. Code, § 6611, to issue subpoenas and compel the attendance of witnesses, under penalty of contempt, and to conduct the examination of the witnesses. Under those provisions we have no doubt that the commissioner would, in all such cases, where sufficient showing is made that the bidding was collusive, or simulative, or violative of the laws relating to such leases, grant such hearing. And we have no doubt it would be his duty, upon such sufficient showing and demand, so to do.

As it appears by the answering affidavits of respondent in each of these proceedings that he is doing or threatening no more than accepting bids from apparently legally qualified bidders to lease to each of them less than one section of land, and that each such bidder is the highest bidder for the tract bid in by him, and that he has no knowledge or information as to the allegations contained in the respective affidavits of relators sufficient to form a belief, we are impelled to hold that he has not acted, or threatened to act, arbitrarily or capriciously, but entirely within his powers and discretion upon the returns made to him; and no more searching proceeding and inquiry having been required of him, he is acting wholly within his powers and duties, with which we cannot interfere.

Writs denied.

MOUNT, FULLERTON, MAIN, and MITCHELL, JJ.,
concur.

[No. 15427. Department Two. August 19, 1919.]

HERMAN J. ROSSI, *Appellant*, v. REX CONSOLIDATED
MINING COMPANY, *Intervener and Respondent*,
CHARLES HUSSEY, *Defendant*.¹

CORPORATIONS—DIVIDENDS—ASSETS OF DISSOLVED CORPORATION. The assets of a dissolved corporation, authorized by the board of directors to be distributed according to law, are not a dividend, but are capital assets.

SAME (55) — STOCK TRANSFERS — RIGHT TO DIVIDENDS. Where a contract for the sale of shares of stock was placed in escrow and no reservation of dividends made by the vendor, the dividends accruing to the stock while in escrow belong to the vendee.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 27, 1919, upon findings in favor of the intervener, in an action

¹Reported in 183 Pac. 120.

Aug. 1919]

Opinion Per MOUNT, J.

to recover dividends upon mining stock, tried to the court. Affirmed.

Lucius G. Nash, Rosenhaupt & Grant, and A. B. Comfort, for appellant.

Burcham & Blair, for respondent.

MOUNT, J.—Plaintiff brought this action to recover two thousand seven hundred one dollars and sixteen cents, claiming the same as dividends accruing to him by virtue of his ownership of two hundred and forty-three thousand shares of the capital stock of the Rex Consolidated Mining Company, a corporation. After issues made, upon a trial of the case the court denied recovery to the plaintiff, and this appeal followed.

The facts are somewhat involved and lengthy and we think need not be stated.

The appellant presents two questions of law: First, Are the assets of a dissolved corporation a dividend, where the board of directors authorized such assets to be distributed to its stockholders according to law? And second, Where a contract of sale of shares of the capital stock of a corporation is made and placed in escrow without any reference being made to dividends upon such shares of stock, is the vendor entitled to dividends?

On the first question, we think there can be no doubt that the assets of a dissolved corporation are not distributed as dividends, as dividends are commonly known. *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637. A dividend, when spoken of in reference to an existing corporation and not one being closed up and dissolved, is understood as a fund which the corporation sets apart from its profits to be divided among its members. 7 R. C. L. 283. Upon the trial of this case, the court concluded

that the proceeds of the sale of assets of a dissolved corporation were capital assets and not a dividend. We are satisfied the trial court was right in this conclusion.

Upon the second question, we are satisfied that the vendor was not entitled to dividends, even if the distribution of capital assets may be held to be a dividend. In 7 R. C. L., at page 292, § 267, under the title "Corporations," the rule is stated as follows:

"As between the vendor and vendee of shares of corporate stock, the vendee is entitled to all dividends declared thereon after the sale of the stock. According to some courts, although the transfer has not been recorded, the transferee has a right to the dividends as against the transferor; but there is authority to the contrary. . . . If, after a contract is made for the sale of shares of stock, but before the time appointed for paying therefor a dividend is declared, the purchaser is entitled thereto on complying with his contract to purchase."

We are satisfied, therefore, that when the contract of sale was placed in escrow and no reservation of dividends was made by the vendor, the dividends which accrued to the stock while in escrow belonged to the purchaser of the stock upon payment of the purchase price.

We conclude, therefore, that the trial court was right, and the judgment is affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and BRIDGES, JJ., concur.

Aug. 1919]

Opinion Per MITCHELL, J.

[No. 15267. Department One. August 19, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
William M. Clapp et al., Respondents, v.
DONALD URQUHART *et al., as County Com-*
missioners etc., of Grant County,
*Appellants.*¹

COUNTIES (91)—CLAIMS — REJECTION — REVIEW. Under the express provision of Rem. Code, § 3909, the remedy by appeal from the county commissioners' rejection of a claim, does not prevent a party from enforcing his claim by direct action in the courts.

MANDAMUS (52) — WHEN LIES — ISSUANCE OF WARRANTS. Mandamus lies to compel the issuance of a warrant by the county auditor to pay a claim arbitrarily rejected by the county commissioners; since mandamus is but one of the forms of procedure provided for the enforcement of rights and the redress of wrongs.

SAME (57) — PAYMENT OF WARRANTS. In mandamus to compel the issuance and payment of a warrant on a claim arbitrarily rejected by the county commissioners, the county treasurer, joined with the auditor and commissioners, should be dismissed, where it does not appear that he would refuse to pay the warrant, nor that he had funds on hand with which to do so.

Appeal from a judgment of the superior court for Grant county, Grimshaw, J., entered November 20, 1918, upon findings in favor of the plaintiffs, in an action for a writ of mandamus, tried to the court. Affirmed in part and reversed in part.

N. W. Washington, for appellants.

William M. Clapp, Daniel T. Cross, and C. G. Jeffers, for respondents.

MITCHELL, J.—This is an action commenced in the superior court of Grant county for a peremptory writ of mandamus. The complaint or petition, supported

¹Reported in 183 Pac. 121.

by the affidavit of one of the applicants, so far as is material here, is in substance as follows:

That, upon the commencement of a suit in Grant county, Washington, to cancel and enjoin the payment of certain county warrants issued by the auditor of that county in payment of the amount due for the construction of a county building by the terms of a contract therefor with the county, the county commissioners of that county entered into a written contract with Messrs. William M. Clapp, C. G. Jeffers and Daniel T. Cross, as lawyers specially employed to represent the county therein; that, by the terms of the contract, they were to act as attorneys in the case in the trial court, and also in this court in case of an appeal by either party, and until the case was fully determined; that they were to be paid four thousand five hundred dollars for their services, as follows: one thousand five hundred dollars upon the signing of the contract and its approval by the judge of the superior court, one thousand five hundred dollars upon the determination of the cause in the superior court, and the remaining one thousand five hundred dollars at the expiration of ninety days from the date of the judgment of the superior court in case no appeal should be taken therefrom, but in the event an appeal was taken, then the last payment to be made as soon as the supreme court had heard the cause; that the contract further provided:

“And the auditor of Grant county is hereby authorized and directed to draw warrants, within the time provided for by law for the payment of the several sums named herein and particularly for the payment of the first payment provided for in this agreement”; that the contract was approved and signed by the judge of the superior court of the county by his writing indorsed thereon according to Rem. Code, § 3908;

Aug. 1919]

Opinion Per MITCHELL, J.

that, pursuant to the contract, the parties represented the county in the suit in the superior court, which suit resulted in a final judgment favorable to the county, dismissing the action; that thereafter, a duly verified statement of account in the sum of one thousand five hundred dollars, together with proof (a certified copy of the judgment of dismissal of the action) of having performed services as attorneys in the cause, was presented to the board of county commissioners, and the board arbitrarily, and without any right or investigation of either the law or the facts, rejected the same; that, because of the terms of the contract that the auditor should draw warrants within the time provided by law for the payment of the several sums named in the contract, proof was furnished the county auditor of the legal services rendered, and he refused a demand to deliver a warrant in the sum of one thousand five hundred dollars due, and said county auditor will not draw or deliver such warrant unless now directed to do so by the board of county commissioners or by order of court; that the county treasurer had declared he would not pay any warrant drawn for such services unless ordered to do so by the court; and that plaintiffs have no plain, speedy or adequate remedy in the ordinary course of the law. The prayer of the application is for a peremptory writ of mandate against the county commissioners, the county auditor to draw a warrant, and the county treasurer to pay the same, in the sum of one thousand five hundred dollars due under the contract.

The county commissioners, the auditor and the treasurer appeared in the action by a demurrer, upon which they chose to stand, upon the grounds:

“(1) That there is a defect of parties defendant.

“(2) That several causes of action have been improperly united.

“(3) That the complaint does not state facts sufficient to constitute a cause of action.”

Upon consideration by the court, the demurrer was overruled; and thereupon the court received proof submitted by the plaintiffs in support of their complaint, upon which, findings of fact essentially the same as alleged in the complaint, and conclusions of law, were signed and filed, whereupon a judgment was entered granting plaintiffs all the relief prayed for.

Defendants have appealed, and the burden of their contention is that the respondents here, who were plaintiffs in the trial court, have mistaken their remedy and were confined to an appeal from the rejection of the claim by the board of county commissioners.

The statute on appeals, Rem. Code, § 3909, expressly provides that such remedy shall not prevent a party from enforcing his claim in the courts by a direct action, after it has been presented and disallowed in whole or in part by the board of county commissioners. “Hence,” as was said in the case of *Lewis County v. Montfort*, 72 Wash. 248, 130 Pac. 115, “in *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, where a claim for salary was presented to the board of county commissioners and disallowed, a direct action brought by the claimant in the superior court against the county was sustained.”

The uniform holding of this court, from the case of *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, to the case of *State ex rel. Taro v. Everett*, 101 Wash. 561, 172 Pac. 752, L. R. A. 1918E 411, has been as was expressed in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, viz.:

“In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action.”

Aug. 1919]

Opinion Per MITCHELL, J.

The remedy of mandamus was successfully employed in the case of *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797, upon the authority of which the present case must be determined against the county commissioners and the county auditor. That was a case of an

“Application to the superior court of Douglas county by A. N. Maltbie, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant for \$294.45, alleged to be due the relator for salary as county clerk.”

The facts were that Maltbie, who was twice elected and served four successive years as county clerk, made claim for an increase of salary for a portion of his first term and a still further increase during his second term, because of changes in the classification of the county based on increased population during those years, which the court found had occurred. During all the time Maltbie had received only the salary suggested by the classification of the county as it existed at the time of his first election. Prior to the action, he made demand upon the county commissioners for the increased salary, which demand was rejected; and a like demand on the county auditor for a warrant was refused. The trial court found that, during the clerk's first term and prior to the second election, the classification of the county was changed so as to increase the clerk's salary fifty dollars per annum, but in its judgment refused any relief to the relator. Upon appeal, the judgment was reversed and remanded with instructions to grant a writ directing the issuance of a warrant for the additional salary of fifty dollars for each of the two last years. In the opinion, after discussing the constitutional provisions prohibiting the increase of compensation of any public officer during his term of office, and stating the con-

clusion that, from the facts found, the relator was not entitled to any increase during the first two years, but was entitled to an increase for the last two years, the court, concerning such conclusion and the procedure adopted, said:

“The respondents do not seriously dispute this conclusion, but contend that no relief can be given in this proceeding, further contending that an application for a writ of mandate will not be granted in part and denied in part; that it must be denied *in toto* if any part of the relief demanded should be refused, and that appellant having asked for a sum greater than that to which he is entitled, can in this proceeding obtain no writ to compel the issuance of a warrant for any smaller sum. We do not think this position can be sustained. Under our code an application for a writ of mandamus is the commencement of a civil action. It is one method of procedure for the enforcement of rights and the redress of wrongs. No alternative writ was requested or issued. The appellant has only asked that a peremptory writ be finally granted after trial. We think he is entitled to a writ in this proceeding directing the issuance of a warrant for such sum as he may be entitled to recover, even though it be less than originally asked by him. This conclusion results from former rulings of this court relative to the writ of mandamus, its functions and powers, and the proper procedure to be adopted on the trial of mandamus proceedings. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Barto v. Board of Drainage Com'rs*, 46 Wash. 474, 90 Pac. 660.”

Concerning the county treasurer, however, we think the case will have to be dismissed. While it is true the complaint alleges the then county treasurer hostile to the payment of such a warrant, it is a fact no such warrant has ever been presented to him for payment, and it is difficult to perceive that any hostility would be manifested by him against the payment of a warrant the integrity of which will have been established

Aug. 1919]

Opinion Per MOUNT, J.

by this litigation; and besides, there is no allegation here concerning the finances of the county with respect to the ability of the county treasurer to pay such a warrant under the statute requiring them to be paid in the order of their issuance.

As to the county commissioners and the county auditor, the judgment is affirmed, while as to the county treasurer it is reversed with directions to dismiss.

Neither party will recover costs on the appeal.

HOLCOMB, C. J., MAIN, and TOLMAN, JJ., concur.

[No. 15365. Department Two. August 20, 1919.]

L. B. SWAFFORD, *Respondent*, v. CARNATION LUMBER & SHINGLE COMPANY *et al.*, *Appellants*.¹

NEW TRIAL (23)—CONFLICTING EVIDENCE—DISCRETION. It is not an abuse of discretion to refuse a new trial for insufficiency of the evidence where the testimony was in direct conflict and made questions for the jury, which were submitted on instructions that were not excepted to.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 4, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Edgar C. Snyder, for appellants.

Flick & Paul, for respondent.

MOUNT, J.—This action was brought to recover one thousand nine hundred and twenty-three dollars, alleged to be due for services rendered to the defendants under a contract of hiring. The defendants, for answer to the complaint, denied the alleged contract and

¹Reported in 183 Pac. 92.

claimed that the services were performed under a joint venture; that the plaintiff had been paid in full and had signed a receipt acknowledging satisfaction. The plaintiff, for reply, denied having executed such receipt, alleging that, if he signed such receipt, the signature was procured by fraud. On these issues the case was tried to the court and a jury, and resulted in a verdict for the plaintiff for the full amount claimed. After verdict, defendants moved the court for a new trial. This motion was denied, and judgment was entered upon the verdict. The defendants have appealed.

They make but one assignment of error, to the effect that the trial court erred in denying the motion for a new trial. They argue that the respondent was not hired and that he was bound by the receipt, which he admitted he had signed. The evidence upon these questions is in direct conflict. They were both submitted to the jury upon instructions which were not excepted to and which are not claimed to be erroneous. Both questions were clearly questions for the jury under the evidence and were resolved in favor of the respondent. The trial court did not abuse its discretion in refusing a new trial.

Judgment affirmed.

HOLCOMB, C. J., FULLERTON, PARKER, and BRIDGES, JJ., concur.

Aug. 1919]

Citations of Counsel.

[No. 15197. Department One. August 20, 1919.]

*In the Matter of the Estate of JOHN MASTERSON.**EMMA J. McMANIS, Appellant, v. GERTRUDE LLOYD,
Respondent.*¹

ADOPTION (11)—INHERITANCE BY ADOPTED CHILD—SISTERS. Under Rem. Code, § 1699, divesting natural parents of all legal rights and obligations in respect to an adopted child, and providing that the child shall be to all intents and purposes the legal heir of the adopter and entitled to all the rights and privileges of a natural child, an adopted child has the right to inherit from a brother or sister by adoption, in view of a liberal construction of the statute.

EXECUTORS AND ADMINISTRATORS (67) — CLAIMS — SERVICES RENDERED DECEASED. A claim against an estate for nursing the deceased, made by one who received regular pay for board, meets the requirement that the evidence for extra compensation must be of the clearest and most convincing character, where it appears that no part of the sums paid were for nursing, and that the guardian of the deceased had agreed to pay therefor.

Appeal from an order of the superior court for Walla Walla county, Mills, J., entered November 15, 1918, distributing the estate of a decedent and allowing a claim against the estate, after a hearing before the court upon the final account of the administratrix. Affirmed.

Evans & Watson, for appellant, cited: 1 Corpus Juris, p. 1401; *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956, 138 Am. St. 247; *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. 196, 23 L. R. A. 665; *Keegan v. Geraghty*, 101 Ill. 26; *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621; *Van Derlyn v. Mack*, 137 Mich. 146, 100 N. W. 278, 109 Am. St. 669, 66 L. R. A. 537; *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 118 Am. St. 672, 8 L. R. A. (N. S.) 117; *Philips v. McConica*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. 753; *In re Bur-*

¹Reported in 183 Pac. 93.

nett's Estate, 219 Pa. 599, 69 Atl. 74; *Rhode Island-Hospital Trust Co. v. Humphrey*, 32 R. I. 318, 79 Atl. 829; *Moore v. Estate of Moore*, 35 Vt. 98; *Kettell v. Baxter*, 50 Misc. Rep. 428, 100 N. Y. Supp. 529; *Estate of Sunderland*, 60 Iowa 732, 13 N. W. 655; *Merritt v. Morton*, 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139; *Gammons v. Gammons*, 212 Mass. 454, 99 N. E. 95; *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612; *Barnhizel v. Ferrell*, 47 Ind. 335; *Helms v. Elliott*, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; *Batcheller-Durkee v. Batcheller*, 39 R. I. 45, 97 Atl. 378; *Baker v. Clowser*, 158 Iowa 156, 138 N. W. 837, 43 L. R. A. (N. S.) 1056; *Upton v. Noble*, 35 Ohio St. 658; *Mono-graphic Note*, 39 Am. St. 226.

John C. Hurspool, for respondent, cited: *Pace v. Klink*, 51 Ga. 220; *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 30 Am. St. 370, 17 L. R. A. 435; *Humphries v. Davis*, 100 Ind. 369; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. 441; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530; *In re Masterson's Estate*, 45 Wash. 48, 87 Pac. 1047, 122 Am. St. 886.

MAIN, J.—This appeal presents for review the order of the superior court distributing the estate of John Masterson, deceased, and allowing a claim against the estate. The deceased left surviving him, as heirs at law, Emma J. McManis, a sister, Andrew A. Smith, a nephew, being the son of a deceased sister, and Gertrude Lloyd, a sister by adoption. For approximately fourteen months prior to his death, John Masterson roomed and boarded in the home of his sister, Emma J. McManis, and during this time A. K. Rice was his duly

Aug. 1919]

Opinion Per MAIN, J.

appointed, qualified and acting guardian. At the time he began to room and board with his sister, the deceased was a bachelor, approximately forty years of age. For his board and room the sister was to receive \$20 per month. This was paid at the end of each month by the guardian and was receipted for by the daughter of Mrs. McManis. After a few months, the amount paid was increased to \$30 per month, and subsequently to \$40. The evidence shows that all the money received was expended for the use and benefit of the deceased. The claim presented, and which was allowed by the court, was by Mrs. McManis for nursing her brother during the fourteen months mentioned, it being her contention that she was to be paid for the nursing in addition to his room and board. During all of this time he was in a deplorable condition, both physically and mentally.

The order of distribution entered in the cause, from which the appeal is taken, distributed a portion of the estate to Gertrude Lloyd, the sister by adoption, as though she were a natural sister, and allowed the claim for nursing. The questions here for review are, first, whether the sister by adoption had a right to a portion of the estate; and second, whether the court properly allowed the claim for nursing.

Gertrude Lloyd was the adopted daughter of Sina Masterson, now deceased. John Masterson was the natural son of Sina Masterson. Emma J. McManis was a natural daughter, and Andrew A. Smith was the son of a natural daughter. Under these facts, is Gertrude Lloyd, a sister by adoption, entitled to an heir's portion of the estate of John Masterson, deceased? Whether she has a right to so inherit depends upon the construction to be given to the adoption statute. Rem. Code, § 1699, provides what shall be the effect of adoption, as follows:

“By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock: Provided, that on the decease of parents who have adopted a child or children under this chapter, and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children.”

By this statute, the natural parents are divested of all legal rights and obligations in respect to the adopted child, and the child is free from all legal obligations of obedience and maintenance of its natural parents. It is expressly provided that such adopted child shall be, to all intents and purposes, the child and legal heir of the adopters, and entitled to all the rights and privileges and subject to all the obligations of a child of the adopters begotten in lawful wedlock. The language of the statute is broad and comprehensive.

One of the rights or privileges of a natural child is to inherit from a brother or sister, the natural son or daughter of the same parents. If the adopted child does not have the same right, then it is denied a right or privilege which the natural child has. The statute says that such adopted child shall be entitled to all the rights and privileges as though it were begotten in lawful wedlock and, to all intents and purposes, shall be the child and legal heir of its adopter. To hold that the adopted child cannot take an heir's portion of the estate of the natural son of the adopting parents would require a strict and narrow construction of the

Aug. 1919]

Opinion Per MAIN, J.

statute. The authorities are not in harmony as to whether such statutes are to be construed strictly or with a tendency to liberality, in order that the primary purpose of such statutes, which is to promote the welfare of unfortunate children, may be carried into effect. Many of the cases adhere to a strict construction, but the prevailing tendency of the more modern authorities is in the direction of a liberal construction. *Batcheller-Durkee v. Batcheller*, 39 R. I. 45, 97 Atl. 378.

While the question involved in *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530, was not the same as here presented, the court's view of the statute there expressed would indicate that the adoption statute was not to be given a strict construction. The statute of descent, Rem. Code, § 1341, subd. 3, provides that: "If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, . . ." If the adopted daughter is not permitted to inherit, it would require a holding that, under this statute, she was not to be considered a sister of John Masterson. In other words, that the natural child and the adopted child of the same parents are not to be considered brothers or sisters. This would be giving a meaning to the words brothers and sisters, as used in the statute, other than what those words are commonly understood to have. We think the trial court properly held that Gertrude Lloyd, the sister by adoption, had a right to inherit as though she were the natural child of her adopted parents.

Many cases from other jurisdictions have been called to our attention. Adoption statutes have been enacted in a large number of the states. Practically all of these statutes are materially different from the statute of this state. In some of them there is express language which would indicate that it was the intention

of the legislature that an adopted child should not inherit as though it were a natural child, except from its adopted parents. In others the language used is much less comprehensive than is that embodied in the statute of this state. It is unnecessary to review the decisions construing these statutes, because each decision is rendered having in mind the language of the statute which was then before the court for construction. There is, however, one statute, that of the state of Ohio, which is substantially the same as our statute and in almost the identical language. The supreme court of that state, in *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. 753, in construing the statute, expressed a view different from that above indicated. But that court held that the statute must be "strictly construed." Since we have declined to adopt the rule of strict construction, the Ohio case cannot be regarded as persuasive authority.

The other branch of this case, that of the claim, presents largely a question of fact. It will be admitted that the rule is that, when one seeks to establish a claim against an estate for extra services rendered the deceased during his lifetime, where regular payment for services was received under the original contract, the burden of showing an agreement for such extra services, either express or implied, is on the one asserting the claim; and that, where payments have been made on the original contract at regular and stated periods, it is the presumption that such payments were received as full compensation for the services rendered. The evidence in support of the claim for extra compensation must be of the clearest and most convincing character. *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916.

In this case the evidence meets the requirements of the rule stated. It shows that no part of the sums

Aug. 1919]

Opinion Per MAIN, J.

paid prior to the death of John Masterson were for the nursing upon which the claim in controversy is based. The money received was for room and board and for other articles for the use and benefit of the deceased. In addition to the other testimony, A. K. Rice, who had been the guardian of the person and estate of John Masterson, and who appears to be a disinterested and credible witness, expressly testified that no payment had been made Mrs. McManis for nursing, and that there was to be a charge for that service later. The record presents no reason for disturbing the holding of the trial court upon the allowance of the claim. The decision of this question is not to be construed as encouraging the withholding of questionable claims until after the death of the party claimed to be indebted and then presenting them against the estate. It would undoubtedly have been better practice in this case to have presented to the guardian from time to time a claim for nursing, so that it could be allowed and paid in due course. As above indicated, since the evidence clearly and convincingly establishes a just claim for nursing, based upon an understanding with the guardian, its allowance by the trial court is approved.

The judgment will be affirmed.

HOLCOMB, C. J., MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 15357. Department One. August 26, 1919.]

QUIGG CONSTRUCTION COMPANY, *Appellant*, v.
CHELAN COUNTY, *Respondent*.¹

HIGHWAYS (33) — CONTRACT—CHANGE—EXTRA WORK—EVIDENCE—SUFFICIENCY. Only upon the clearest and most satisfactory evidence, if at all, could there be any estoppel on the part of a county to invoke the clause of a contract for road work which provided, pursuant to Rem. Code, § 5879-9, that no payment shall be made for extra work unless authorized by the county commissioners and approved by the state highway commissioner.

SAME (33)—EXTRA WORK—QUANTUM MERUIT. An action on *quantum meruit* for extras cannot be maintained where a county road contract had at no time been rescinded or modified and it specifically covered the manner in which extras could be allowed.

SAME (33). Compensation for extra yardage removed at places where the alignment was changed cannot be recovered on proof of the difference between the preliminary estimates and the total yardage removed including "overbreakage," where, under the contract, no allowance was to be made for overbreakage and there was no evidence to show the extra amount removed at the places where the road was changed.

Appeal from a judgment of the superior court for Chelan county, Truax, J., entered August 3, 1918, upon findings in favor of the defendant, in an action on contract, tried to the court. *Affirmed*.

Crollard & Steiner and *Reeves & Reeves*, for appellant.

W. E. Whitney and *Peters & Powell*, for respondent.

MAIN, J. — This action is based upon a claim for extras alleged to have been earned in the performance of a road contract. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment denying a recovery. From this judgment, the plaintiff appeals.

¹Reported in 184 Pac. 331.

Aug. 1919]

Opinion Per MAIN, J.

On the 26th day of July, 1915, the respondent contracted with the appellant for the building of a road approximately one mile in length along the shore of Lake Chelan. This road is known as permanent highway No. 7, and the contract was made under and pursuant to §§ 5879-1 to 5879-10, Remington's Code. The contract was for a lump sum of \$16,000, which has been paid. The road was to be constructed along the side of a high hill and much of it was to be blasted out of solid rock. The contract provided that no payment should be made for any extra work outside of that embraced in the plans, specifications and estimate, nor should there be any alterations made during the progress of the work "unless the same shall be authorized by the board by resolution and said resolution approved by the state highway commissioner, and ordered in writing by the engineer."

The statute under and pursuant to which the contract was made and which is referred to therein, among other things, provides:

"No payment shall be made for any incidental changes during the progress of the work, unless the same shall have been approved by the board of county commissioners by resolution, and a copy of said resolution shall have been transmitted to the state highway commissioner." Rem. Code, § 5879-9.

The provisions of the contract and the statute, requiring that charges for extras during the progress of the work shall not be allowed unless approved by the board of commissioners by "resolution" and a copy of said resolution be transmitted to the state highway commissioner, was not complied with. No resolution of the board authorizing or approving the extras was ever passed. Notwithstanding this fact, the appellant brings this action for the purpose of recovering approximately the sum of \$25,000 for extras

claimed to have been earned during the progress of the work. As the work proceeded, one item of extra work for the sum of \$1,309 was approved by the board, by resolution, and subsequently paid. Over this item there is no controversy here.

The lump sum contract price for the work, as above stated, was \$16,000. The contract apparently is the usual contract in such cases, and provided that the work should be done in accordance with the plans and specifications, which became a part of the contract. The appellant claims that the respondent is estopped from invoking the provisions of the contract and the statute referred to. During the progress of the work, the engineer representing the county, as he testifies, found that the road in certain places could not be built according to the plans and specifications because it would not hold, and called this fact to the attention of the commissioners. The commissioners, or one of them in the presence of the others, informally replied that it was up to the engineer to build the road.

For the purpose of this opinion only, it will be assumed, but not decided, that the commissioners might be guilty of conduct which would estop the respondent from invoking the contract and the statutory provisions to the effect that no extras should be allowed unless the same were approved by the board of county commissioners by resolution and a copy of the resolution transmitted to the highway commissioner. If there could be such estoppel, it could only be upon proof of the clearest and most satisfactory kind. *Brown v. Winehill*, 3 Wash. 524, 28 Pac. 1037; *James Reilly Repair & Supply Co. v. Smith*, 177 Fed. 168. The evidence in this case is not of that clear and satisfactory character which would bring it within the rule. The statute was enacted for a purpose and it cannot be lightly avoided, if at all.

The appellant attempted to bring the action upon the contract and, also, upon *quantum meruit*. The contract had at no time been rescinded or modified and specifically covered the manner in which extras could be allowed. In such a case, an action on the *quantum meruit* for extras cannot be maintained. The rule upon this question, as stated in *Hawkins v. United States*, 96 U. S. 689, is:

“That, if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*.”

The case of *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, has no application because in that case there was no express contract. The contract which the parties attempted to make was void because of failure to comply with the statutory requirements.

There is another reason why the appellant cannot prevail in this cause. The changes made in the highway, after the work was begun, consisted in causing the work to be moved farther into the hill in two or three places, the aggregate distance of which was from 300 to 600 feet. According to the contract, the slope left by the excavating in solid rock was to be one-fourth of a foot horizontal to one foot perpendicular, and no allowance for excavations outside the limit of such slope was to be made unless by special order of the engineer. Any excavation beyond this specified slope was what is referred to as overbreakage. In other words, overbreakage is the amount of material taken from the inside bank outside of the standard slope, as specified in the specifications. The trial court

found that no measurement or estimate was ever made by the engineer of the number of yards of rock or other material which the appellant was required to excavate or move, or did excavate or move, by reason of any changes in, or alterations of, the plans and specifications. The changes, as above mentioned, consisted in setting the road farther into the hill in two or three places. The evidence does not show the extra amount of material that it was necessary to move by reason of these changes. If we understand the evidence correctly, it takes the total amount of yardage removed, including the overbreakage, for the entire length of the road and deducts from this the preliminary estimate, and thus arrives at a balance for extra yardage. Under the contract and specifications, no allowance was to be made for the overbreakage. Since the evidence does not show the amount of extra yardage removed at the places where the alignment of the highway was changed, and includes items for which no recovery can be had, there is no evidence in this case which would furnish a basis for estimating the damages. The finding of the trial court on this question was right and should be sustained.

It is claimed, however, that the engineer made a final estimate of the amount of extras and submitted it to the board of commissioners, and that, therefore, the respondent is bound thereby. The engineer made a number of so-called final estimates the last of which, which is here referred to, was made after the engineer realized that the matter of extras would be litigated, and after the engineer had discussed the matter with the county attorney, the commissioners and the appellant. The trial court found, referring to the last final estimate, that it was made by the engineer "both arbitrarily and by mistake, and the same is wholly false."

Sept. 1919]

Syllabus.

Under the evidence, no other finding could properly be made.

Assuming, as we have, for the purpose of this decision only, that the appellant had made a case which would justify the consideration of the merits, it cannot prevail upon the evidence offered. The view we take of the case, as above indicated, renders it unnecessary to consider the other points discussed in the briefs or to review the numerous authorities therein cited.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

[No. 15339. Department One. September 3, 1919.]

SAMUEL S. LEHMAN, *Respondent*, v. MARYOTT &
SPENCER LOGGING COMPANY, *Appellant*.¹

NEGLIGENCE (3)—FIRES—LIABILITY—CARE TO PREVENT SPREADING. Liability for starting a fire on one's own land, which spread to adjoining property, must be based on negligence, i. e., failure to act as a reasonably prudent person would under like circumstances.

SAME (3, 38)—FIRES — FAILURE TO CONTROL — EVIDENCE — SUFFICIENCY. There is no evidence to justify a finding of negligence by a logging company in burning a camp-site under direction of a Federal forest ranger, where, for two or three days there had been no fire except a smouldering root near the center of the camp which could not be extinguished, and an experienced watchman was left and visited the property hourly prior to the fire and discovered it soon after it broke out, and it could not be checked because of an unusual wind.

SAME (3, 15) — FIRES — PROXIMATE AND INTERVENING CAUSE. A strong wind but for which no loss would have occurred, and which arose some days after a logging company had burned a camp-site and extinguished all fire except a smouldering root, is an intervening cause which relieves from responsibility for the original fire, even if defendant had been guilty of negligence.

¹Reported in 184 Pac. 323.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 23, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

George H. Walker and Robert B. Walkinshaw, for appellant.

Elias A. Wright and Sam A. Wright, for respondent.

MAIN, J.—The purpose of this action was to recover damages for loss of property destroyed by fire. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff. The defendant interposed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, both of which were overruled. Judgment was entered upon the verdict, and the defendant appeals.

The respondent is the owner of a small ranch on the north bank of the Dosewallips river, about six miles west of Brinnon, in Jefferson county. On this ranch there were some small buildings and other articles of property. The Maryott & Spencer Logging Company, the appellant, was engaged in logging operations on the south side of the Dosewallips river and near the respondent's ranch. The appellant desiring to change the location of its logging camp, sometime prior to the 28th day of May, 1918, felled and bucked the timber on a tract of land on the south side of the river for a distance of about seven hundred feet running along the river and extending back about three hundred and fifty feet. This tract of land was across the river from the respondent's property and a little to the west. The river at this place is approximately one hundred feet wide. The tract of land referred to was in the Olympic National Forest Reserve. On the 28th day of May, 1918, the timber upon the camp site,

having been previously cut and prepared, was burned under the direction and supervision of a Federal forest ranger who was acting in the line of his duty.

Prior to the firing, a fire trail had been made around the tract to be burned. As is common in such cases, the fire continued to burn in various places over the tract until on the 4th day of June, when it escaped to the adjoining property, and after burning over six or seven acres, was put under control and spread no farther. On the 7th day of June there was no fire, either on the original tract fired or that to which it had escaped on the 4th of June, except one smouldering root in about the center of the proposed camp site. This was burning under ground and was so situated that it could not be extinguished. The fire was beneath the surface and a little smoke was coming therefrom. All the debris over the tract had previously been consumed by the fire. On this date some dirt was thrown over the smouldering root. Conditions remained the same until Sunday afternoon, June 9th, when a fire occurred which destroyed the respondent's property, for which he seeks recovery. The fire also destroyed a large amount of property owned by the appellant.

During the forenoon of the 9th, the wind arose and increased in velocity until about two or three o'clock in the afternoon, when it was blowing what is referred to as a gale. At about the time the fire started, the wind was not blowing consistently in one direction, but was whirling to some extent. On Sunday the watchman was on duty, a man of many years' experience in the woods. He visited the camp site between nine and ten o'clock in the morning, and at that time there was smoke only from the one smouldering root above referred to. He visited the site every hour

thereafter, and when he was returning to it, between two and three o'clock in the afternoon, he observed a couple of "little fires on the hill above the camp site." He started for the logging camp to get help, but owing to the wind prevailing at that time, the fire spread rapidly and did a great amount of damage. The facts above stated are supported by evidence not in conflict.

The first question is whether the appellant was negligent in looking after the fire after it had been started, and particularly on the 9th of June. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If, in this regard, he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence. Liability must be predicated upon negligence. *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43; *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200.

Applying the rule stated to the present case, we think there is no evidence to justify a finding of negligence on the part of the appellant. For two or three days prior to the 9th of June, there had been no fire except the smouldering root. This was near the center of the camp site, and the debris thereon had been previously burned. A watchman had been left in charge, who visited the property hourly on Sunday prior to the fire and discovered it soon after it broke out. At this time the condition of the wind was such that the fire spread with great rapidity. Under the circumstances, the appellant exercised ordinary care to prevent the spreading of the fire. It was as vitally interested in seeing that the fire did not escape as was any other person, if not more so. It was not reason-

Sept. 1919]

Opinion Per MAIN, J.

ably to be anticipated that the wind would cause the fire from the smouldering root to escape and do damage, assuming that it came from this source. There is no evidence of any other fire upon the tract at that time or for some days previous.

Assuming, however, that the appellant did not exercise the required degree of care, it does not follow that the respondent can prevail. If the appellant were negligent and a new cause intervenes which of itself is sufficient to stand as the cause of the misfortune, the first act is considered too remote to sustain a recovery. In *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, upon this question, it was said:

"One who loses property by fire is governed by the established rules of law, and recurring to first principles, if subsequent to the act of the party charged, whether it be rightful in its inception, or wrongful in the sense that it is negligent, a new cause intervenes which of itself is sufficient to stand as the cause of the misfortune, the first act is considered as too remote to sustain a recovery. In logging operations and in the clearing of new lands, it is necessary to build fires and to destroy waste. This cannot be done without a certain hazard to other property, but the law does not, for that reason, deny the right to maintain fires in the prosecution of legitimate business, nor will it charge one with negligence who fails to put out a fire which is not threatening, when such fire, by reason of some new cause, lodges on the property of another or goes beyond the control of the person who set it out."

In this case it is apparent that no fire would have occurred, and no loss would have resulted from the fire, had it not been for the unusual condition of the wind. A strong wind which arises while a fire is in progress and carries it where it would not otherwise have spread is an intervening cause which will relieve

the party responsible for the original fire from liability for loss. In Thompson's Commentaries on the Law of Negligence, vol. 1, § 126, the rule is so stated:

"A strong wind which arises while a fire is in progress and carries it where it could not otherwise have spread, and there destroys property, is an intervening cause which will relieve the party responsible for the original fire from liability for the loss of such property, under principles already explained."

Considerable discussion is found in the briefs under the question of when the wind, being considered as the "act of God," will relieve from liability and when it will not. The rule on this question is well stated in Thompson's Commentaries on the Law of Negligence, vol. 1, § 72, as follows:

"The rule under this head can well be said to be that 'when the act of God is the cause of loss, it is not enough to show that the defendant has been guilty of negligence; the case must go further and show that such negligence was an active agent in bringing about the loss, without which agency the loss would not have occurred.' "

The evidence in the present case fails to show that, even though the appellant was negligent in looking after the fire, such negligence was the active agent in bringing about the loss, and without which agency the loss would not have occurred.

The unconflicting evidence in this case can lead to but one conclusion, which is that the active agent in producing the loss for which this action was brought was the violence of the wind, without which it would not have occurred. This, as stated in *Stéphens v. Mutual Lumber Co.*, *supra*, was an intervening new cause "which of itself" was sufficient to stand as the cause of the misfortune.

The case of *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656, is different in its facts and, therefore, distinguish-

Sept. 1919]

Opinion Per MAIN, J.

able. In that case, railroad contractors in construction work permitted sparks or live coals from an engine operating a steam shovel to fall upon the right of way and allowed the fire to spread to an adjoining meadow, during the dry season, and took no precautions against the communication of the fire to the adjoining lands. In other words, they permitted the sparks and live coals to fall upon dry grass in the right of way without exercising any care to prevent it from spreading to adjoining lands.

The case of *New Brunswick S. & C. T. Co. v. Tiers*, 24 N. J. L. 697, and the case of *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, are both cases where property was lost or destroyed while in the possession of a carrier. The rule of liability of a carrier in such cases being that of an insurer and not that of ordinary care, those cases are inapplicable here.

The judgment will be reversed, and the cause remanded with a direction to the superior court to dismiss the action.

HOLCOMB, C. J., MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15386. Department Two. September 17, 1919.]

*In the Matter of the Estate of ERIC HAMILTON.*¹

EXECUTORS AND ADMINISTRATORS (62) — ALLOWANCE TO WIDOW — CONCLUSIVENESS — VACATION. Under the probate code, Laws of 1917, p. 670, § 103, providing that the judgment awarding an allowance for support to a widow shall be conclusive and final, except on appeal and except for fraud, the judgment cannot be attacked by motion to vacate it after time for appeal has expired, where the court had jurisdiction of the parties and subject-matter and there was no claim of fraud.

CONSTITUTIONAL LAW (136) — DUE PROCESS — CIVIL REMEDIES — FINALITY OF ALLOWANCE TO WIDOW. Laws of 1917, p. 670, § 103, providing that a judgment awarding an allowance for the support of a widow shall be conclusive and final, except on appeal and except for fraud, and limiting parties to an appeal from the award, is not an attempted deprivation of property without due process of law.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered February 13, 1919, denying the vacation of an order setting aside property of an estate to a widow as a homestead, after a hearing before the court. Affirmed.

G. D. Eveland, for appellant.

Francis W. Mansfield, for respondent.

HOLCOMB, C. J.—Section 103, ch. 156, Laws of 1917, p. 670, provides:

“If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court, upon such notice as may be determined by the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to

¹Reported in 184 Pac. 337.

Sept. 1919]

Opinion Per HOLCOMB, C. J.

the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand dollars (\$3,000.00); . . . which property so set off shall include the home and household goods, if any, and such award shall be made by an order or judgment of the court and shall vest the absolute title, and thereafter there shall be no further administration upon such portion of the estate so set off, but the remainder of the estate shall be settled as other estates. The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud. The awards in this section provided shall be in lieu of all homestead provisions of the law and of exemptions."

On January 10, 1917, and before the above law went into effect, Eric Hamilton died, leaving certain property, the heirs to which were his widow and several brothers and sisters, among them the appellant. On the 19th day of January of that year, the widow was appointed administratrix of the estate, decedent's will having been set aside by the court because of mental incompetency. February 20, 1918, and after the above law was effective, the widow petitioned the superior court to set aside to her, according to the terms of the foregoing section, the house in which she and the deceased had dwelt, together with certain household goods therein. Notice of hearing of her petition was given by posting under the order of the court, as permitted by the probate code of 1917 (Laws 1917, p. 657, § 64). The court found that the provisions of § 103 as to the value of the property, the expenses of last sickness and for the funeral, etc., had been properly complied with, and entered its order granting the petition and setting aside the property as a homestead as prayed. The balance of the estate, of which there was considerable, proceeded to probate in the usual course of law.

Months thereafter, when it was too late for an appeal, William Hamilton, a brother of the deceased and one of his heirs, moved the superior court to set aside the order theretofore entered granting the administratrix's petition, principally upon two grounds: first, that William Hamilton had had no notice of the petition in question, and second, that § 103 "either has no application to said matter, or is unconstitutional and void."

The motion was denied by the superior court for the reason that, aside from any constitutional question, the vacating of the order was improperly moved, the remedy, as provided by the section itself, being by appeal from the order, or for fraud:

"The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud." Laws 1917, p. 670, § 103.

The determining question emerging in this case is: Is the alleged error of the superior court in setting aside to the widow the property petitioned for properly attacked by a motion to vacate such order, or is the appellant restricted to an appeal, the matter of fraud not being involved, either in fact or law, in this case?

Disposing briefly of the contention as to lack of notice, the superior court found, and we are satisfied with its finding, that the procedure under the section was sufficient to give it jurisdiction of the matter and that it had jurisdiction of the subject-matter and of the persons concerned.

The language of § 103 clearly makes the order of the probate court, setting aside the property therein specified to the surviving spouse, a final judgment of the court: "The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final"

Sept. 1919]

Opinion Per HOLCOMB, C. J.

The trial court, having jurisdiction of the parties and the subject-matter, may have erred in law or fact. Possibly the superior court may, upon timely motion, vacate such final judgment upon other grounds than fraud to correct its own errors before the judgment is final. But when it acquired jurisdiction of the matter and of the parties, and merely erred in its judgment, such judgment certainly is not void.

The section itself explicitly provides that such question, or indeed any question concerning the award save that of fraud, cannot be raised except by appeal from that final judgment. In view of the express declaration of the statute, the only constitutional question now possible is whether we have here an attempted deprivation of right without due process of law, which we have not sustained. This is not the constitutional question learnedly argued by counsel for appellant, whose attack is upon the ground that, to give the statute effect upon heirs in whom property vested by operation of law prior to the enactment of § 103, would be such deprivation of right as is prohibited by the constitution. All the weight of his argument in that respect was properly conceded by the superior court, and may be conceded here, without affecting the question as to whether, by being restricted to an appeal, and denied a remedy by untimely motion or petition to void the judgment, appellant is deprived of a constitutional right.

Appellant cites *Stark Bros. v. Royce*, 44 Wash. 287, 87 Pac. 340, where it is said: "A void judgment is properly set aside upon motion." Also, *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785, stating that:

"The right to vacate such judgments does not arise out of, nor does the procedure to secure the right depend upon, the statute. . . . It is inherent in the

court itself. It is no more nor less than the power possessed by every court to clear its record of judgments void for lack of jurisdiction."

And *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446, where we said: "We think, in the absence of any statute, the court has a right to set aside a void judgment. This power is inherent in the court." These cases are not in conflict with the line of decisions wherein we have held the parties to the exclusive remedy of appeal.

There is an inherent power in the superior court to vacate certain void judgments, and this inherent right is not denied but recognized by the language of § 103. But an inherent right is not necessarily an exclusive right, or a right which may not be modified by proper authority. The very expression in *Dane v. Daniel*, *supra*, that, "in the absence of any statute," the court has this inherent right, is clearly a recognition that this inherent right may be qualified by statute. In *Lushington v. Seattle Auto & Driving Club*, *supra*, the pronouncement is upon "judgments void for lack of jurisdiction"; a harmony of principle with the provision of § 103 that the superior court may vacate its own award on the showing of fraud. The bare statement in *Stark Bros. v. Royce*, *supra*, that "a void judgment" may be set aside upon motion, cannot be reasonably construed into a commission *carte blanche* to the superior court to vacate its judgments, regardless of statutory control. In *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990, we sustained a decree of distribution depriving pretermitted heirs of their alleged vested rights in the property, saying:

"When the statutory provisions are complied with, the distribution is said to partake of the nature of a proceeding in rem, and is conclusive upon all persons having any interest in the estate.' . . . The decree was a final adjudication by a court of competent juris-

Sept. 1919]

Opinion Per HOLCOMB, C. J.

diction, upon due process of law, as to his right and title thereto."

On the other hand, this court has carefully upheld such statutory restrictions. It is only necessary to cite our decisions in this matter without particularizing them: *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733; *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149; *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *State ex rel. Lundin v. Superior Court*, 90 Wash. 299, 155 Pac. 1041; *Morgan v. Williams*, 77 Wash. 343, 137 Pac. 476.

The dissenting opinion in *Coyle v. Seattle Electric Co.*, *supra*, does not question the principle here involved, but simply argues that an order granting a new trial is not a judgment, and that, therefore, error in a ruling made upon a motion for such new trial may be cured by the superior court. But, as we have seen, the express language of § 103, here under consideration, is that the award there permitted is a judgment, final and conclusive in its terms.

The order of the lower court denying the motion to vacate the original award is affirmed.

FULLERTON, MOUNT, BRIDGES, and PARKER, JJ., concur.

[No. 15387. Department Two. September 17, 1919.]

JOHN JOHNSON *et al.*, *Respondents*, v. D. A. CLEMENTS,
Appellant.¹

SALES (182) — CONDITIONAL SALES — DEFAULT IN PAYMENT — EVIDENCE—SUFFICIENCY. The weight of the evidence sustains findings that the purchaser of a sawmill under a conditional sales contract was in default, entitling the vendors to forfeit the contract, notwithstanding conflicting evidence as to a verbal extension of time, there being evidence that the extension was for but two weeks, and that the purchaser defaulted on demand made thereafter.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered November 25, 1918, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. *Affirmed*.

Kerr & McCord, for appellant.

R. J. Faussett and *E. C. Dailey*, for respondents.

MOUNT, J. — On the 20th day of December, 1917, John Johnson and W. S. Keller, copartners, sold to D. A. Clements, under a conditional sale contract, a certain sawmill, and the machinery and equipment belonging thereto, for the agreed price of four thousand three hundred dollars. One thousand five hundred dollars was paid at the time of the purchase, and the balance was to be paid in two equal installments of one thousand four hundred dollars. One of these installments was due on the 20th day of June, 1918, and the other on the 20th day of December, 1918. The conditional sale contract provided:

“In case default be made by the vendee in paying for said property according to the terms hereof, then the vendors shall be entitled to retain all money paid by the vendee on account of the purchase price as

¹Reported in 184 Pac. 318.

Sept. 1919]

Opinion Per MOUNT, J.

liquidated damages and not as a penalty, and all the rights of the vendee to the use of said property shall cease, and the parties of the first part, the vendors, may change their option, take the property in payment of the balance due and owing them under the terms hereof."

Mr. Clements took possession of the property under this conditional sale contract, and in the latter part of August, 1918, Johnson and Keller, copartners, brought this action for the purpose of canceling the contract and forfeiting all the rights of Mr. Clements thereunder, alleging that the purchaser was in default of the payment of the first installment due on June 20, 1918. Mr. Clements filed an answer, denying default in payment, and alleged that, prior to the time when the first installment came due, an extension of time was granted; that he had made certain payments relying upon that extension; that, thereafter, the plaintiffs had taken possession of the property, which was of the value of six thousand dollars; and, by way of cross-complaint, he alleged that he had been damaged in the sum of four thousand dollars thereby. Plaintiffs, for reply, denied the affirmative allegations of the answer. Upon these issues the case was tried to the court without a jury. At the close of the trial, the court made the following finding:

"That D. A. Clements, the vendee, and defendant herein, has wholly failed and neglected to pay the payment due thereon within six months after the 20th day of December, 1917, except the sum of \$457.56, and that payment has been demanded before this action was brought, and defendant had failed to make said payment to comply with said conditional sale contract as provided therein, and is therefore in default."

On this finding the trial court entered a judgment in favor of plaintiffs, canceling the conditional sale contract and leaving the possession of the property in

plaintiffs. Defendant has appealed from that judgment.

Several assignments of error are made, but it is necessary to notice but one. Appellant contends that the evidence is contrary to the finding above quoted. He testified, in substance, that, before the one thousand four hundred dollar payment became due in June, 1918, he requested an extension of time until he could sell certain cedar lumber then in the yard; that the respondents extended the time as requested. The respondents, on the other hand, testified that they made no such agreement. They testified that, after the one thousand four hundred dollar payment due in June was in default, Mr. Clements came to them and said, in substance, that, if they would not crowd him for a couple of weeks, he would ship out five or six car loads of cedar lumber and pay the balance due upon the one thousand four hundred dollar payment; and that they thereupon said to him: "Mr. Clements, if you can pay us fifteen hundred dollars in two weeks that will be all right." They also testified that the cedar lumber, or a greater part thereof, was shipped from the yard and that no payments were made to them; and that afterwards they demanded payment and payment was not made, whereupon they brought this action.

A reading of the testimony in the record convinces us that the weight of the evidence is in favor of the finding made by the trial court, from which it is plain that the appellant was in default at the time this action was brought, and, under the plain terms of the contract, respondents were entitled to rescind the conditional sale and take back their property, which they did.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., FULLERTON, PARKER, and BRIDGES, JJ., concur.

Sept. 1919]

Opinion Per BRIDGES, J.

[No. 15301. Department Two. September 18, 1919.]

E. I. DUPONT DE NEMOURS POWDER COMPANY, *Appellant*,
v. HANS PEDERSON *et al.*, *Respondents*.¹

FRAUDULENT CONVEYANCES (91)—FRAUD—EVIDENCE—SUFFICIENCY. Under the presumption that a transaction has been honestly made, and the rule that proof of fraud must be clear and satisfactory, quitclaim deeds by a debtor, pending a suit, will not be held fraudulent as to creditors, where one of them was intended as a mortgage to secure a *bona fide* debt, and the other was to pay an antecedent debt and upon sufficient consideration.

MORTGAGES (22)—PAROL EVIDENCE AS TO DEED. Oral evidence is admissible to prove that an absolute deed was intended as a mortgage.

FRAUDULENT CONVEYANCES (88)—EVIDENCE—ADMISSIBILITY. In an action to set aside a deed as fraudulent as to creditors, the question as to whether the deed was antecedent to a judgment against the grantor, and therefore subject to the judgment, is not in issue, since the lien of the judgment may be enforced without recourse to such an action.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 23, 1918, in favor of the defendants, in an action to set aside deeds for fraud, tried to the court. *Affirmed*.

Trefethen & Findley, for appellant.

Roberts & Skeel, for respondents.

BRIDGES, J.—On the 18th day of May, 1917, Hans Pederson and wife were the owners of lot 15, block 41, Denny & Hoyt's addition to the city of Seattle (which will be hereafter referred to as the Fourth street property), and lot 3, block 10, Kinnear's supplemental addition to Seattle, and lot 3, block L, W. N. Bell's 5th addition to Seattle, all in King county, Washington. On that date, they made a quitclaim deed of all the property mentioned to Geo. L. Haley, of Seattle.

¹Reported in 184 Pac. 316.

Thereafter, and on the 16th day of January, 1918, Haley and wife deeded to Millie Madison all of the property except the Fourth street lot. On December 15, 1917, the appellant, in another action, obtained a judgment in excess of \$17,000 against the respondents Pederson and wife. It issued execution, which was returned *nulla bona*, and being unable to find property of Pederson and wife out of which to satisfy its judgment, or any part of it, it brought this suit to set aside the transfers above mentioned. The complaint alleged that these transfers were without valid consideration and were fraudulently made for the purpose of defeating the creditors of the respondents Pederson and wife, and particularly the appellant. The several respondents answered separately, admitting the execution and delivery of the deeds mentioned, but denying all other allegations of the complaint. From judgment dismissing the action and quieting title in Millie Madison, this appeal is taken.

The testimony is very lengthy and we cannot here pretend to set it forth in detail; we will, however, undertake to give a general summary of it. The appellant relied almost exclusively upon the testimony of two witnesses. One testified that Mr. Haley had told him that the properties which had been deeded were really owned by Mr. Pederson, though he held the "paper" title to a part thereof, and Millie Madison held the "paper" title to the remainder. Another of appellant's witnesses testified that Mr. Haley had told him that he, Haley, held the property in trust for Pederson, and that the property was deeded to him because Pederson anticipated the appellant would obtain a judgment against him, and he did not want to have the property in his name if such judgment were obtained. It further appeared from appellant's testimony that, at about the time the deed from Haley to

Sept. 1919]

Opinion Per BRIDGES, J.

Madison was given, Pederson constructed an apartment house on lot 3, block L, Bell's 5th addition to Seattle, being a part of the property involved in this action; that, while the title to the lot was in the name of Millie Madison, respondent Pederson did practically everything pertaining to the construction of the apartment; he looked after obtaining a loan of \$24,000 for the purpose of building the apartment house; much of the materials going into the building were obtained on his credit; he made arrangements for the renting of the apartments, took the rents, and deposited the money so collected in the bank in his own name. The respondent's testimony showed that Pederson and Haley were, and for a long time had been, intimate friends and business associates; that Pederson was a contractor and builder, and that he had gotten into financial straits and had called upon his friend Haley to assist him; that, in this way, at the time of the delivery of the deed from Pederson to Haley, the former had become indebted to the latter in the sum of about \$6,000 for services performed and money advanced to or for Pederson; that, in addition thereto, Haley had signed bonds and other obligations for the use and benefit of Pederson; that the deed from Pederson to Haley was given to secure Haley for the indebtedness which was owing from Pederson to Haley, and that, as a matter of fact, the deed was, and was intended to be, a mortgage, and that, at the time of the trial in the lower court, Pederson was still indebted to Haley in certain sums of money. The evidence does not show the exact amount of such indebtedness, but that the amount was considerable, there can be no doubt.

About January, 1918, Haley wanted some of the money which Pederson owed him, and the latter, in

order to get the money, had Millie Madison make sale of a \$2,500 note and mortgage held by her, the proceeds of which were turned over to Pederson. In addition to this indebtedness of \$2,500, Pederson also owed Miss Madison and her two brothers, who were at the war, certain additional but undetermined sums of money. Upon paying this \$2,500 to Mr. Haley, Mr. Pederson requested him to deed directly to Miss Madison all of the property above mentioned except the Fourth street property, which it was agreed Haley should continue to hold as security. Haley complied with this request and made the deed to Miss Madison. It further appears conclusively that Pederson was the uncle of Miss Madison and her brothers and had been administrator of their father's estate, and had been guardian of one or more of them, and that he, Pederson, had for a long time looked after their business affairs.

We have not only read carefully the abstracts of the testimony as presented by the parties hereto, but we have been at pains to read the statement of facts itself, and our conclusion is that the deed to the Fourth street property now held by Haley is a mortgage, and that, while Haley is the owner of the record title, Pederson and wife are the equitable owners; that the title to the property deeded to Millie Madison now rests absolutely in her, and that a valid consideration was paid, and that there was no fraud in the giving or receiving of any of the deeds complained of. The conclusions to which we have come are strictly in accordance with the conclusions which the trial court reached.

While there are certain circumstances surrounding these transactions which are of a suspicious nature and present many badges of fraud, yet the court will always presume that a transaction has been honestly

Sept. 1919]

Opinion Per BRIDGES, J.

made and carried out, and the evidence of fraud must be clear and satisfactory. *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748; *Roberts v. Washington National Bank*, 11 Wash. 550, 40 Pac. 225; *Smith v. Doty*, 91 Wash. 315, 157 Pac. 881; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347. The testimony fails to convince us of any fraud.

The appellant assigns a number of errors based on the permission given the respondents to testify as to what was the oral agreement between the respondents herein concerning the deeds in question. It has always been the rule in this court that oral testimony may be received to show that an instrument, which upon its face is a deed, is in fact a mortgage. *Samuel v. Kittinger*, 6 Wash. 261, 33 Pac. 509; *Ross v. Howard*, 31 Wash. 393, 72 Pac. 74; *Barrow v. Barrow*, 34 Wash. 684, 76 Pac. 305. The appellant, however, seems to contend that Haley holds the title to this property in trust for Pederson. We do not think there is any trust relationship or question involved in this case, and consequently the cases cited by appellant concerning receiving oral testimony to prove or disprove a trust are inapplicable.

The appellant insisted before the trial court that the evidence showed that the lien of its judgment preceded the conveyance of the property to Miss Madison, and asked that court to decree that Miss Madison holds her title subject to the prior lien of the judgment. The trial court refused to make any findings or conclusion on this question. This ruling was right. This was a suit to set aside certain deeds to real estate because of alleged fraud. The only judgment the court could make would be either to find that there was fraud and set aside the deeds, or find that there was not fraud and dismiss the action. The question as to whether or not the plaintiff's judgment is a lien upon

any of the property is not involved in this case. If Millie Madison holds the title subject to lien of appellant's judgment, that lien may be enforced without recourse to such an action as this. Finding no error, the judgment is affirmed.

HOLCOMB, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 15440. Department One. September 18, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Frank P. Mullen, Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent*.¹

STATUTES (24)—INITIATIVE AND REFERENDUM — WHO ARE "LEGAL VOTERS." Under Rem. Code, § 4971-12, providing for the certification of the signatures of legal voters upon initiative and referendum petitions, "legal voters" include only persons having the constitutional qualifications who are registered upon the poll books and not cancelled by failure to vote; in view of Const., art. 6, § 7, authorizing a registration law, and Rem. Code, § 4771-2 enacted pursuant thereto, which provides that, in cities where registration is required, citizens are not entitled to vote if unregistered, or if, having been registered, they suffered their names to be cancelled by failure to vote.

Application filed in the supreme court July 2, 1919, for a writ of mandamus to compel the secretary of state to return referendum petitions to the several registration officers for certification of signatures. Denied.

John F. Murphy, for relator.

The Attorney General and *John H. Dunbar*, for respondent.

MACKINTOSH, J.—The relator seeks by writ of mandate to compel the secretary of state to return petitions on referendum No. 14 (the prohibition amendment to

¹Reported in 184 Pac. 333.

Sept. 1919]

Opinion Per MACKINTOSH, J.

the Federal constitution) to the registration officers of the various cities and towns of the state, for the purpose of having such officers certify as legal voters those signers of the petitions whose registrations had been cancelled because of their failure to vote at the last state or municipal election. It is urged that mandamus is not the proper remedy, that the question raised by the pleadings is a moot one, and that the court has no jurisdiction. While some or all of these contentions of the respondent may be correct, we prefer to leave them undiscussed here, and to rest this decision upon the merits and determine what is meant by the term "legal voters," as used in § 12, ch. 138, Laws of 1913; Rem. Code, § 4971-12. That section, referring to initiative and referendum petitions, provides:

"The secretary of state upon any such petition being submitted to him for filing shall examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters . . . the secretary of state shall accept and file said petition in his office . . ."

Section 1, article VI, of the state constitution, as amended at the election in November, 1910, reads as follows:

"All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote, etc."

The relator argues that all persons meeting the requirements as in this section set forth are "legal voters," entitled to sign initiative and referendum petitions, and calls attention to Rem. Code, § 4971-10,

which provides for the method of certification of petition signatures by the officers, who shall compare them as they appear upon the petitions with those upon the registration books of the precincts where registration is required.

In the instant case, the signatures which it is claimed should be counted are those of persons who possess the qualifications provided in § 1, art. VI, of the state constitution, and who have registered as voters in their various precincts, but who failed to exercise their right to vote at the last general election, and whose names have therefore been stricken in conformity with § 11, ch. 16, Laws of 1915, p. 40:

“If any registered voter shall fail to vote at any state, county or municipal election . . . his registration shall become void, and his name shall be stricken from the registration books . . . Before said voter shall again be allowed to vote, he shall re-register in his proper precinct, as required in cases of original registration.” Rem. Code, § 4771-2.

This act was passed in pursuance of the power given the legislature by § 7 of art. VI of the constitution:

“The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote: *Provided*, That this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes.”

The constitution and the statute enacted in compliance with its mandate have determined that, in addition to the qualifications of citizenship and residence mentioned in § 1, art. VI, of the constitution, there must be, in cities and towns of over five hundred inhabitants, a registration, in order to make one a legal

Sept. 1919]

Opinion Per MACKINTOSH, J.

voter; registration which has been cancelled for failure to vote being made void by the statute, the certifying officer has no more right to consider the names so stricken than he has to certify the names of all persons in cities and towns of five hundred and over population, who may meet the qualifications of § 1, art. VI, of the state constitution, but who have never registered. The rights and status as voters of those who are qualified and have registered and failed to vote, and those who are qualified but have never registered are the same. The legislature, having the right to provide the means of determining the validity of signatures to initiative and referendum petitions (*State ex rel. Kiehl v. Howell*, 77 Wash. 651, 138 Pac. 286), has said that citizens of cities and towns where registration is required are not "legal voters" if unregistered, and they are unregistered when they have not had their names upon the poll books, or, having had them there, have suffered them to be cancelled by failure to vote; in either case, they cannot exercise the right to petition for the initiation or reference of laws. The rule is sensible, salutary and sound. The respondent was correct in his interpretation of the law, and the writ will be denied. It is so ordered.

HOLCOMB, C. J., BRIDGES, MAIN, and PARKER, JJ.,
concur.

[No. 15263. Department Two. September 24, 1919.]

W. B. WILLIAMS, *Appellant*, v. GREAT NORTHERN
RAILWAY COMPANY, *Respondent*.¹

CORPORATIONS (115)—OFFICERS AND AGENTS—EMPLOYMENT—REMOVAL. Under Rem. Code, § 3683, authorizing corporations to appoint "officers, agents and servants," to require security of them, and to "remove them at will," the term "servants" includes one employed by a railroad company as a switchman, and is not restricted to employees in a fiduciary capacity.

EVIDENCE (27)—PRESUMPTIONS—LAWS OF OTHER STATES. In the absence of pleading or proof, the law of the contract made in a sister state is presumed to be the same as our own.

CONTRACTS (174)—ACTIONS FOR BREACH—PLEADING—ILLEGALITY. In an action upon a contract which is, upon its face, void and unenforceable, as a matter of law, the defendant may invoke its invalidity as a defense without specially pleading it.

HOLCOMB, C. J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 6, 1918, dismissing a cause of action on contract, on sustaining a challenge to the sufficiency of the evidence, after a trial on the merits to a jury. Affirmed.

Cooley, Horan & Mulvihill, for appellant.

F. V. Brown, F. G. Dorety (*A. J. Laughon*, of counsel), for respondent.

PARKER, J.—The plaintiff, Williams, seeks recovery of damages which he alleges resulted to him from the breach by the defendant railway company of an employment contract entered into by it with him. He set up in his complaint two causes of action, the first seeking damages for the alleged breach of the contract. We are here concerned only with the first cause of action. The case proceeded to trial, and at the close

¹Reported in 184 Pac. 340.

Sept. 1919]

Opinion Per PARKER, J.

of the evidence introduced in behalf of the plaintiff, the trial court, upon motion made by counsel for the defendant challenging the sufficiency of the evidence to support any recovery upon the first cause of action, rendered its judgment of dismissal as to that cause of action, from which the plaintiff has appealed to this court.

The controlling facts may be summarized as follows: In May, 1904, while employed as a switchman for the company in Minnesota, appellant was seriously injured as the result of a defective appliance upon one of its cars. In August of that year, the company compromised and settled his claim for damages so resulting to him, by paying him \$4,000, when he signed a release evidencing full satisfaction therefor. At the time of this settlement and in connection therewith, the claim agent of the company signed and gave to appellant the following writing:

“Mr. W. B. Williams, in addition to the amount paid him this date in settlement of his claims for personal injuries, will receive upon application for the same, re-employment at a salary not less than he received when injured.”

In December, 1905, appellant having recovered sufficiently to enable him to go to work, he was again employed by the company, and was so employed until June, 1917, when he was discharged, being then in the company's employ in this state. Thereafter, in May, 1918, he commenced this action in the superior court for Snohomish county.

It does not appear in the record before us upon what ground the superior court rested its order of dismissal as to the first cause of action; but counsel for the company contend that the judgment of dismissal must be affirmed upon the ground, among others, that the contract of employment, if it be a contract for permanent

employment, as appellant contends—and we shall assume that it was for present purposes—is void and unenforceable as a contract for permanent employment. We find it unnecessary to notice other grounds urged in support of the judgment of dismissal. The company by its answer denied that it had made any contract with appellant for permanent employment, but did not specially allege in its answer that the contract for employment, if it should be construed as one for permanent employment, was void and unenforceable as such; nor did appellant allege or attempt to prove that such contract was valid and binding under the laws of Minnesota, the state in which it was made.

Section 3683, Rem. Code, prescribes the powers of corporations organized under the laws of this state, and reads in part as follows:

“To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation;

“To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will.”

These statutory provisions have been given full force and effect by us in the following of our decisions: *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913B 667; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, Ann. Cas. 1915D 346, 51 L. R. A. (N. S.) 398; *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, 153 Pac. 317; *Barager v. Arcadia Orchards Co.*, 91 Wash. 294, 157 Pac. 675. In the last cited case, we held that no contract of employment could be valid and binding upon the corporation in the sense that it would deprive the corporate authorities of the statutory power to “remove,” at any time without incurring liability by the corporation,

Sept. 1919]

Opinion Per PARKER, J.

an employee who goes into the corporation's employ under a contract of employment for a specific time; though, in the case first cited, there was language used in the course of the decision which seemed to intimate that the statute applied only to "employees of a fiduciary character who are to occupy positions of responsibility and trust," such as there might be occasion to require security from for the faithful performance of their duties. We think it follows that this contract, in so far as it was a contract for permanent employment, was wholly void and unenforceable in this action, if the law of this state is controlling.

That the law of this state is controlling in our disposition of this case we think is plain, in view of the fact that the law of Minnesota, where the contract was made, was neither pleaded nor sought to be proven by appellant in this action. We must therefore proceed upon the assumption that the law of Minnesota is the same as our own upon this subject. *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111.

Some contention is made in behalf of appellant that the question of the validity of this contract as a contract for permanent employment, is only a question of *ultra vires*, and that, therefore, the company should have pleaded in its answer that the contract was void because beyond the power of the corporation to make, before it could invoke the defense of the invalidity of the contract. There might be some force in this contention if the question of the power of the company to make such contract and render it binding upon the company in the future were here involved as a question of fact, requiring proof of facts to establish such invalidity, rather than being determinable purely as a question of law. The real question here is something more than a question of *ultra vires* as a question of fact. The company was not required to plead in its

answer that it intended to rely upon this statute rendering the contract void as a contract of permanent employment. The contract being void and unenforceable as a contract of permanent employment, and it being so determinable as a matter of law from the face of the contract without the determination of any issue of fact, the company was privileged to invoke such invalidity as a defense without specifically pleading it. The decision of this court in *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404, is in harmony with and lends support to this conclusion.

The judgment is affirmed.

FULLERTON, MOUNT, and BRIDGES, JJ., concur.

HOLCOMB, C. J., dissents.

[No. 15286. Department One. September 24, 1919.]

FRANK SCHELLER, *as Administrator, etc., Appellants*, v.
TACOMA RAILWAY & POWER COMPANY, *Respondent*.¹

COVENANTS (11) — RAILROADS (18) — GRANT OF RIGHT OF WAY — CONDITIONS—FORFEITURE. To avoid a forfeiture for condition subsequent, the courts are inclined to regard a grant of land to a railroad in consideration of an agreement to operate the road and maintain a station, as creating a covenant running with the land, and not a condition subsequent, and consequently privies and successors in interest could maintain an action for damages on breach of the contract.

RAILROADS (18)—COVENANTS AND CONDITIONS—SUBSTANTIAL PERFORMANCE. The covenants in a grant of land to a railroad whereby the company agreed to operate the road and maintain a station are substantially performed by compliance with the contract for a period of twenty-five years; and abandonment of the road thereafter does not give rise to an action for damages for breach of the covenant.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 27, 1918, dis-

¹Reported in 184 Pac. 344.

Sept. 1919]

Opinion Per MACKINTOSH, J.

missing an action for breach of covenant, upon sustaining a demurrer to the complaint. Affirmed.

Guy E. Kelly and Thomas MacMahon, for appellants.

F. D. Oakley, for respondent.

MACKINTOSH, J.—Respondent's predecessor was incorporated for the purpose of building and operating an electric railroad line between Tacoma and Steilacoom. One Whyte at the time was owner of section 22, which was situated near the line of the proposed railroad. Whyte platted a portion of the southwest quarter of that section and, by written agreement with the railroad company, agreed to convey to it the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$; E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$; Blocks 7, 8, 15, 16, together with a strip of land 30 feet wide through the S. E. $\frac{1}{4}$ of the section upon which the railroad had been located. The agreement between Whyte and the railroad company provided that Whyte should give a warranty deed to it and its assigns, which deed was to be deposited in escrow "to be delivered to the said party of the second part upon the performance by the said party of the second part of the following covenants and conditions, that is to say:

"The said party of the second part is to pay to the said parties of the first part the sum of one dollar, amount expressed in said deed as the consideration thereof, and shall on or before the 30th day of January, 1891, build, equip and operate a narrow gauge railroad between its point of beginning at, in or near the city limits of the city of Tacoma, Pierce county, state of Washington, along, through, over and by that certain lot, piece or parcel of land belonging to the said party of the first part, particularly described as follows:

"A strip of land thirty (30) feet in width through the southeast one-quarter of section No. twenty-two

(22) in township No. twenty (20) north of range two (2) east of Willamette M., said strip being fifteen (15) feet on either side of the center line of the railroad track of the said party of the second part as the same is now located and shall be hereafter constructed through said tract, which said last described tract of land the said parties of the first part for the consideration of one dollar, the receipt whereof is hereby acknowledged, do hereby grant and convey unto the said party of the second part, its successors and assigns forever in fee simple for the use, and purpose of a right of way for said railroad forever disclaiming any and all interest in and to said tract, provided, however, that said party of the second part shall use said described tract for the purpose of said right of way and other railroad purposes, and from thence to such a point at or near section 29 in township 20 north, of range 2, E. W. M. (or further if considered practicable or desirable), as the said party of the second part may determine and shall at all times maintain and operate said narrow gauge railroad either by itself or assigns between its terminal points and shall establish and maintain a station at such point upon or near the land last hereinabove described as shall be determined on, on the line of said railroad, and as shall be most advantageous to the parties hereto and shall stop the trains of said railroad at such stations on all trips either coming or going between said terminal points for the accommodation of the parties of the first part herein and any and all passengers who may desire or seek transportation from said station by said route or line of railroad.

“And it is stipulated, understood and agreed by and between the parties to this contract that as soon as said line of railroad is established, completed and equipped along and upon said last described lands said Pacific National Bank, who holds said deed in escrow, shall and may then deliver as the act and deed of the parties of the first part the said deed to the party of the second part herein for its own use and benefit, and for the benefit of its assigns.

Sept. 1919]

Opinion Per MACKINTOSH, J.

"And it is understood and agreed between the parties hereto that the party of the second part is to have the immediate possession and control of said premises from and after the execution of said contract, and should said party of the second part fail to build and equip said railroad and to build and maintain such station as herein provided, then the said Pacific National Bank, who holds said deed in escrow, shall deliver said deed back to said parties of the first part, their heirs or assigns, and this agreement shall thereupon be void and of no effect."

The railroad company constructed the road, obtained the deed, and took possession of the property, selling and disposing of that portion thereof not used by it for its right of way. At the time of platting, Whyte mortgaged all of the S. W. $\frac{1}{4}$ of the section except the E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ to the Mason Mortgage Company, which sold the mortgage to the ancestor of the plaintiffs, who purchased the mortgage, relying upon the value of the property as the same was enhanced by the railroad and transportation facilities, the property not then or now being worth the purchase price except as the same should be connected with Tacoma by adequate transportation facilities. Thereafter the respondent in this action purchased all the property and franchises of the Tacoma and Steilacoom Railway Company and operated the road for twenty-five years or more. The appellant's ancestor was compelled to and did foreclose the mortgage and bought in the property at the mortgage sale, and died, devising the property to the appellants. Thereafter the respondent discontinued the operation of the railroad at this point and tore up and abandoned the same; and the appellants brought this action at law seeking to recover damages from the respondent for its failure to comply with the agree-

ments in its contract, upon the theory that these agreements constituted covenants running with the land and that the abandonment of the railroad constituted a breach of such covenants, which entitled the appellants to maintain an action for damages. A demurrer was sustained to the complaint and the action was dismissed, upon which this appeal was taken.

It is to be borne in mind that this is not an action seeking to enjoin the railroad company from abandoning the line, such as was the case of *Day v. Tacoma R. & Power Co.*, 80 Wash. 161, 141 Pac. 347, L. R. A. 1915B 547, which relates to the same situation, and to which case reference is made for the facts relative to the abandonment; that being an action where the property owners were attempting to obtain equitable relief by way of injunction. Nor is this an action in equity seeking to recover property granted to the railroad company upon a breach of the conditions accompanying the grant. The appellants argue that the agreement between Whyte and the railroad company created covenants running with the land, and that, therefore, they being now the owners of the land, can recover for the breach of such covenants. The respondent argues that the agreement merely created conditions subsequent, for a breach of which the proper parties in interest would be confined to a forfeiture of the property granted; and that the appellants, not being the grantor nor his heirs, are strangers to, and have no right under, the contract to enforce such forfeiture or recover damages.

This phase of the case involves one of the most complicated questions in the law. From the time of *Spencer's Case*, reported in 5 Coke 16, till the present day the courts have been engaged in painstaking but irreconcilable expositions of the subject, until, as was said by this court in *Pioneer Sand & Gravel Co. v. Seattle*

Sept. 1919]

Opinion Per MACKINTOSH, J.

Construction & Dry Dock Co., 102 Wash. 608, 173 Pac. 508:

"Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land. . . . At any rate, the contract appears to be such a covenant regulating or restricting the use of the land as will be enforced in equity, when the party acquiring title took with notice, whether it is technically a covenant running with the land or not."

The law not looking with favor upon forfeitures, the courts have been inclined, in cases difficult of solution, to resolve the doubt in a disputed agreement as creating a covenant running with the land rather than as a condition subsequent. *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701. The following cases, including *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.*, just cited, would incline us to the view that the agreement between Whyte and the railroad company gave rise to covenants running with the land: *Withers v. Wabash R. Co.*, 122 Mo. App. 282, 99 S. W. 34; *Dorsey v. St. Louis, A. & T. H. R. Co.*, 58 Ill. 65; *Georgia Southern R. v. Reeves*, 64 Ga. 492; *Gilmer v. Mobile & M. R. Co.*, 79 Ala. 569; *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 129 Am. St. 423, 17 L. R. A. (N. S.) 130; *Blanchard v. Detroit, L. & L. M. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Ford v. Oregon Elec. R. Co.*, 60 Ore. 278, 117 Pac. 809, Ann. Cas. 1914A 280, 36 L. R. A. (N. S.) 358.

The case of *Mills v. Seattle & M. R. Co.*, 10 Wash. 520, 39 Pac. 246, holding that the agreement there under consideration was a condition subsequent is based upon the fact that the grantee was in that case insisting upon such a construction; the court saying:

“It is a proposition too well understood to require argument or citation, that courts do not favor forfeitures, and that, for that reason, they go very far in construing the provisions of a deed poll against the grantor, to the end that the estate granted may not be defeated, since the almost universal effect of sustaining a stipulation in such an instrument as a condition subsequent is to work great hardship upon the grantee. But wherever the terms of the instrument are plain and unambiguous, there is no hesitation in enforcing the actual contract made by the parties.

“Where, however, the rare instance occurs, as it does here, that the grantee is found insisting upon the construction of a condition subsequent, and that forfeiture shall take place, all consideration for him, and all idea of hardship to him is eliminated, and the court is free to act without such consideration. The appellant here has all along been urging the theory of a condition subsequent, and has by its answer offered to pay the just value of the land taken by it, and damages to land of the respondent not taken.”

Mouat v. Seattle, L. S. & E. R. Co., 16 Wash. 84, 47 Pac. 233, was dealing with a stipulation in a deed which on its face was apparently intended as a condition subsequent. The same is true of the case of *Sherman v. Town of Jefferson*, 274 Ill. 294, 113 N. E. 624; and *Fowler v. Coates*, 201 N. Y. 257, 94 N. E. 997.

On the assumption, then, that Whyte's contract with the railroad company created a covenant running with the land, it would follow that the plaintiffs in this action were the proper parties and that an action for damages for breach of those covenants would be maintainable by them if not defeated by other principles of law; which brings us to the consideration of the next point presented by the respondent, viz.: that the contract did not impose upon the railroad company the duty of operating the railroad in perpetuity or during any specified period; that the terms of the con-

Sept. 1919]

Opinion Per MACKINTOSH, J.

tract were substantially complied with by the railroad having been operated for a period of twenty-five years.

With this statement, the law seems to agree with practical unanimity. *Mead v. Ballard*, 74 U. S. 290, was an action brought in ejectment to recover land conveyed upon the understanding that an institution of learning "shall be permanently located upon said lands," which institution was located with the intention that there should be its permanent situation. The buildings were thereafter destroyed by fire and the institution subsequently erected upon another piece of land. The supreme court of the United States, in that case, said:

"The thing to be done was the location of the institute. Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers of the institution were to determine, in good faith, the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract.

"Counsel for the plaintiff attach to the word 'permanent,' in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties.

"We are of the opinion that the testimony shows, in any view that can be taken of it, that the condition

was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs."

The supreme court of the United States in *Newton v. Commissioners*, 100 U. S. 548, was considering a case where the county seat of one of the counties of Ohio "was permanently established in the town of Canfield," the citizens of that town having furnished the land for the purpose of having the county buildings erected thereon. The court held that although the contract provided for a permanent establishment (it will be noticed that the contract before us merely provided for construction and maintenance and nowhere is the word "permanent" or its equivalent used) that the contract should not be construed so as to compel the county seat to remain forever upon the land granted and that the grantor must be presumed to have known that the legislature had power to remove the county seat at pleasure, and that he must be held to have had in view the possibility of such change when he made his grant.

So here, when Whyte made his grant, he realized that he was dealing with a public service corporation and its duties to and control by the public were matters which must be held to have entered into his contract. The leading case on this subject is *Texas & Pac. R. Co. v. Marshall*, 136 U. S. 393, being a case where the city of Marshall, Texas, gave to the railroad company \$300,000 in bonds and 66 acres of land for shops and depot, the company in consideration of this action agreeing to "permanently establish its eastern terminus and Texas offices at the city of Marshall" and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on

Sept. 1919]

Opinion Per MACKINTOSH, J.

its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The supreme court held that the contract on the part of the railway was satisfied and performed when the city had been made the terminus, stores and shops set up and kept going eight years, until the interests of the public and of the railroad demanded the removal of some or all of those subjects of the contract to another place; that the contract, under the circumstances, had been complied with and that the public interest was served by abandoning and removing the property.

Whalen v. Baltimore & O. R. Co., 112 Md. 187, 76 Atl. 166, had been once before the court as an action in equity to compel the railroad company to specifically perform its agreement which it had made with the plaintiff's predecessors to construct and operate and maintain a side-track. (*Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 129 Am. St. 423, 17 L. R. A. [N. S.] 130.) The side-track was maintained for a period of fifty-nine years and then abandoned. The supreme court of Maryland, having dismissed the equity action, the plaintiffs began an action in law for damages for breach of contract. The court held that the word "maintained," as used in such agreement, did not require the railroad company to continue the side-track permanently; that the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the railroad was not liable in damages for its breach:

"Considering the language used in the covenant before us, it is to be observed that, while it distinctly provides for the construction and maintenance of the turnout and siding . . . it is entirely silent as to

the duration of the maintenance of those structures or that service. We cannot yield our assent to the contention of the appellant that the word 'maintain' ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates. There is plainly no specific or positive provision in the covenant touching the duration of the time during which the covenanted acts are to be done or privileges furnished."

Judge Taft, in *Jones v. Newport News & M. V. Co.*, 65 Fed. 736, held that an agreement by a railroad company and one owning land adjacent to its track to establish and maintain switch connections could not be the basis of a recovery of damages upon the railroad's discontinuing the service, the court saying that to hold otherwise would :

"forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road."

Texas & Pac. R. Co. v. Scott, 77 Fed. 726, 37 L. R. A. 94, dealt with a contract between Scott and the railroad company whereby Scott contracted to give a right of way over his land if the company would establish a depot thereon. The railroad was built and the depot established and maintained for thirty-six years, when it was abandoned for reasons connected with the best interests of the public and the company. The court held that the contract did not bind the railroad company to keep up a depot forever, but that its maintenance until such time as the best interests of the public and the corporation required abandonment was a substantial compliance with the contract.

In *Lucas v. New York, N. H. & H. R. Co.*, 130 Fed. 436, the defendant had contracted with the plaintiff in consideration of his dedicating a strip of land for

Sept. 1919]

Opinion Per MACKINTOSH, J.

the purpose of constructing a roadway that it would make, when it changed its passenger station, a suitable entrance way into its station grounds and continue the roadway eastward. This the railroad did, but very shortly thereafter the roadway and entrance were discontinued. It was held that defendant did not bind itself to maintain a permanent entrance and road, and having maintained the same until the city had changed the grade, it was not liable for breach of its covenant.

In *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, the plaintiff conveyed land to the defendant upon a contract by which the defendant agreed to build and maintain a packing house of specified capacity, the contract providing no time during which the agreement should endure, the deed reciting that it was made "upon condition of the due performance of the contract by the grantee." The packing house was built, but its operation subsequently abandoned.

"Another feature of the transaction which seems to us of much significance is that no time was fixed during which the obligation to maintain and operate the packing house should endure. It seems to be hardly reasonable to suppose that the parties could have understood that this covenant should continue to operate perpetually. Indeed, one can hardly withstand the conviction that the covenant was expected by the parties to have some limitation in respect of time, and, if so, it might be a question whether any other limitation is more natural or probable than that it should abide such contingencies of the business as could not in the natural course of things be avoided, as, for instance, could not, with prudent management, be carried on without loss. Of course, we are not now undertaking to lay down a particular definition of the contingencies which might terminate the obligation."

These cases would seem to be squarely in point on the question before us and to determine it in respond-

ent's favor. This being true, the demurrer was properly sustained.

FULLERTON, TOLMAN, MAIN, and MITCHELL, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15377. Department Two. September 24, 1919.]

MAY BRANDON, *Administratrix, Respondent*, v. GLOBE INVESTMENT COMPANY, *Appellant*.¹

MASTER AND SERVANT (98, 99)—ASSUMPTION OF RISKS—KNOWLEDGE BY SERVANT OF DEFECT OR DANGER. An experienced window washer assumed the risk or was guilty of contributory negligence, when, owing to defective window stops, a window he had frequently washed and to which he was holding, pulled through and he was killed; the master having no notice of the defect.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 10, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the wrongful death of a window washer, after a trial on the merits. Reversed.

Roberts & Skeel, for appellant.

Karr & Gregory and *H. G. Sutton*, for respondent.

BRIDGES, J.—On April 27, 1918, and for many years prior thereto, the appellant was the owner of the Globe Block, in Seattle, Washington. For six or eight years prior to that date, Neil A. Brandon had been employed as the window washer for such block. He used his own methods and tools in the performance of this work. It had been his habit to wash the windows several times each year. The windows were all of the common upper and lower sash kind. On the

¹Reported in 184 Pac. 325.

Sept. 1919]

Opinion Per BRIDGES, J.

date above mentioned, Brandon was washing one of the windows on the second floor of the building. While no person saw the accident, yet we believe it can fairly be stated that, after washing the inside of this particular window, the deceased raised the lower sash and climbed out onto the window sill, then lowered both sashes, and, while holding on to the window with one hand, used the other to wash the outside of the window. Manifestly the window was not sufficient to bear such weight as he put on it; for he fell to the paved alley below, and shortly thereafter died as a result of the fall. The window had pulled through and between the stops, and was hanging out over the side of the building by means of the window ropes. Those who afterwards found the window in this condition replaced it between the stops without the removal of the latter.

The respondent is the duly appointed administratrix of the deceased's estate. The negligence charged against the appellant is that it kept the window in an improper and unsafe condition and so that the casing did not properly fit, and that the window was loose and could with ease be pulled through the strips or stops intended to hold it in place. There was a verdict in a substantial sum for the respondent. This appeal is from the judgment entered thereon. The appellant, during the trial, made timely motions for nonsuit, an instructed verdict and for a new trial, all of which, however, the trial court refused.

It is too well settled to need citation of authority that it is the duty of the master to furnish his servant a reasonably safe place in which to work; but another rule, which qualifies and runs with the one announced and which is equally well settled, is that, where the danger or defect is as much open to the view and knowledge of the servant as of the master, then the

servant cannot recover for an injury, because he, having knowledge of and appreciating the danger or defect, either is guilty of contributory negligence or has assumed the risk. It is upon this principle that this case must be decided. In the case of *Griffin v. Ohio & M. R. Co.*, 124 Ind. 326, 24 N. E. 888, it was said:

“Where the danger is alike open to the observation of all, both the master and servant are upon an equality; and the master is not liable for an injury resulting from the dangers of the business.”

At § 346, *Beach on Contributory Negligence* (3d ed.), it is stated:

“Knowledge on the part of the employer, and ignorance on the part of the employee are of the essence of the action; or, in other words, the master must be at fault and know of it, and the servant must be free from fault, and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications.”

The rule above announced has become the settled law of this state. In the case of *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937, Judge Dunbar announced the rule in the following language:

“It is claimed by the respondent that the rule that, where a servant enters upon employment, ‘he assumes the usual risk and perils of the service,’ as applied to the facts of this case, still gave the respondent the right to assume that the master had furnished him a safe and convenient place in which to perform the services required of him. That proposition is no doubt correct, but the assumption cannot be relied upon after actual knowledge to the contrary is brought home to the mind of the servant. The assumption will control only where the danger is not apparent. No sane man is expected to act on an assumption which he knows to be false. It is a man's duty to exercise

Sept. 1919]

Opinion Per BRIDGES, J.

common sense when in the employment of a master, as well as any other time."

In the case of *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N.S.) 283, this court said:

"That the master is under obligations to give the servant a reasonably safe place to work is, of course, a well established principle of law. But where the servant is in as good a position as the master to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, he cannot be heard to complain from injuries sustained by working therein."

In the case of *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831, the rule was announced in the following language:

"The master could have no more knowledge of such a defect than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury. The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects."

To the same effect, see the following cases: *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E 178; *Dahl v. Puget Sound Iron & Steel Works*, 77 Wash. 126, 137 Pac. 315; *Johnston v. Nichols*, 83 Wash. 394, 145 Pac. 417;

Dixon v. Western Union Tel. Co., 68 Fed. 630; *Larson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Day v. Cleveland, C., C. & St. L. R. Co.*, 137 Ind. 206, 36 N. E. 854; 18 R. C. L., § 172 *et seq.*, page 683 *et seq.*

The testimony in this case plainly shows that the master did not have any actual knowledge of the defect in the window in question; indeed, it shows that the janitor whose duty it was to look after and repair the windows in the building did not know of the defect. The deceased, however, was an experienced window washer. He was allowed to do the work by his own methods and with his own instruments. He had washed the windows of this building, including the one in question here, probably once a month for a number of years. No one could have been so well acquainted with the defects in this window as he; for it is admitted that such defect as there was must have existed for a number of years. The window was not made to serve the purpose to which the deceased was putting it; and, if he desired to use it in that way, it was his absolute duty to make investigation and learn for himself whether or not it was of sufficient strength to permit him to safely make such use of it. The slightest investigation by him would have shown him whether he could safely do his work in the way he desired to do it. He could not blindly rely on the duty of the master to furnish him a reasonably safe window for the uses which he desired to make of it. He had a duty to himself; a duty to make investigation to see if the window was strong enough to serve his purpose. The law would not permit him to close his eyes to all defects and then, if he be injured as a result of some defect which it was the duty of the master to remedy, recover damages of the master for such injury. Any such rule would allow the man injured to take advantage of his own wrong and would

Sept. 1919]

Opinion Per BRIDGES, J.

encourage carelessness. If the window casing in the first place had been built too small, or if it was shrunk so that it would push out between the stops, this condition must have been manifest to the deceased had he made the smallest amount of investigation. It is very clear to us from the facts that the deceased was either guilty of contributory negligence or assumed such risk as existed in doing the work in the way he did it. Most, if not all, the cases relied upon by respondent, were based and decided upon principles of law not involved here. In most of them the defect was latent and the instrument or place was being put to a common use. The case of *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127, was one where the plaintiff sued to recover damages for an injury to her hand caused by the breaking of the chains supporting a window sash. She was in the act of raising the window when the chain broke. Here the defect was latent and the ordinary use was being made of the window.

In the case of *McIntyre v. Detroit Safe Co.*, 129 Mich. 385, 89 N. W. 39, the facts were that the plaintiff had driven a wagon on certain scales for the purpose of weighing the load. The sills below broke because of defects. Again we have a plain case where the defect was latent and a casual examination would not have shown it, and the scales were being put to the use for which they were built.

In the case of *Alamo Oil & Refining Co. v. Richards*, 172 S. W. (Tex. Civ. App.) 159, the court expressly held that the plaintiff was not required to examine for latent defects.

In the case of *White v. Beverly Bldg. Ass'n*, 221 Mass. 15, 108 N. E. 921, the plaintiff was using a common stair with a railing. The railing broke and resulted in injury to the plaintiff. Plainly this case does

not involve the same principles which must control the one before us.

The other cases relied upon by respondent are of the same general kind as those which we have noticed. They are all vastly different in their facts from the case at bar.

The case of *Fanjoy v. Seales*, 29 Cal. 244, very closely resembles the case at bar. The facts were that appellant was painting a brick building which had but recently been completed by contractors employed by appellee. In order to do the painting appellant had suspended a staging to the cornice of the building, and while he was standing on the cornice in the performance of his work, a portion of the wall, together with the cornice, fell, throwing him to the ground and injuring him. The testimony showed that appellant was doing his work in the usual and customary way, and that appellant was ignorant of any defect. The court said:

“Cornices are intended and constructed for ornamental purposes, and not for the use to which the one in question was put by the painters. We are not satisfied that the general custom of painters to use cornices for supporting the stagings and platforms necessary for the prosecution of their work of painting houses imposes on the owners thereof the duty of constructing such cornices sufficiently strong to sustain burdens for which they were not designed.”

We see no escape from the conclusion that the judgment must be reversed and the case remanded for dismissal.

It is so ordered.

HOLCOMB, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

Oct. 1919]

Opinion Per MAIN, J.

[No. 15204. Department One. October 1, 1919.]

R. B. TATUM, *Respondent*, v. MARSH MINES
CONSOLIDATED, *Appellant*.¹

MASTER AND SERVANT (74) — FELLOW SERVANTS — METHODS OF WORK—STATUTORY LIABILITY. An agreement between one employed as a blacksmith and his helper as to the method of performing their work does not fall within the provisions of Laws of Idaho, 1909, p. 34, § 1, making the master liable for injuries to servants by any act of fellow servants done in obedience to the rules and regulations or by-laws of the master.

STATUTES (74)—CONSTRUCTION—PROVISOS. A proviso attached to a statute is a restraint upon or exception to it and does not extend the scope of the class of persons that come within it.

MASTER AND SERVANT (100, 101) — ASSUMPTION OF RISKS — COMPLAINTS—PROMISE TO REMOVE DANGER. A blacksmith's assumption of risk from the incompetence of his helper is not avoided by the fact that he made two complaints to the foreman and requested a change of helpers, where he did not indicate unwillingness to remain in the service, and the foreman merely stated he would see what could be done about it.

EVIDENCE (27)—PRESUMPTION—LAWS OF OTHER STATES. In the absence of proof, it will be presumed that the law of another state as to assumption of risks is the same as the common law of this state.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 5, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee of a mining company. Reversed.

Post, Russell & Higgins, for appellant.

Carl Ultes, Jr., for respondent.

MAIN, J.—This action was instituted to recover damages for personal injuries claimed to have been caused by negligence chargeable to the defendant. The cause was tried to the court and a jury, and resulted in a

¹Reported in 184 Pac. 628; 187 Pac. 410.

verdict in favor of the plaintiff. At the conclusion of plaintiff's case in chief, the defendant challenged the sufficiency thereof and requested the court to enter a judgment in its favor. This motion was overruled, and was repeated at the end of all of the evidence, with a like result. After the verdict was rendered, the defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion for judgment notwithstanding the verdict was overruled. The motion for a new trial was overruled upon the condition that the plaintiff should elect to remit from the verdict the sum of \$2,500. The election being made, judgment was entered on the verdict for the reduced amount, from which judgment the defendant appeals.

The appellant is a corporation and, at the time of the injury for which recovery is sought in this action, was operating a mine near Burke, in the state of Idaho. The respondent was employed as a blacksmith in connection with the operation of the mine. The work for which the respondent was employed was done in a blacksmith shop located near the mine. A part of the work which he was required to do was that of sharpening steel. In the blacksmith shop, working with the respondent, was one John Klodt, whose duties were those of a blacksmith's helper.

The steel to be sharpened consisted of bars of from five to seven feet in length. In the blacksmith shop was a furnace in which one end of the bars of steel was placed to be heated. There was a sharpening machine in the shop also. Klodt had been employed as a blacksmith's helper prior to the employment of the respondent. When the latter was employed, he and Klodt talked over the plan or method by which they would work together in heating and sharpening the steel. Under the arrangement mutually agreed upon between

Oct. 1919]

Opinion Per MAIN, J.

them, Klodt was to cause the steel to be placed in the furnace, and when the end was sufficiently hot, to remove it therefrom, place the hot end in the die to be sharpened, and the other end upon a trestle or tripod nearby. After it was sharpened by the respondent operating the machine, it would be removed by the respondent and placed one end upon the floor of the shop. Thereupon the helper would remove from the furnace another piece of steel, place it in the machine ready for sharpening, and would remove the one previously sharpened from where it had been placed by the respondent when taken out of the machine.

While working in this way, one of the pieces of steel which had been placed ready for sharpening dropped, or partly dropped, to the floor, and while the respondent was in the act of stooping to pick it up and place it in proper position, the helper brought another piece of hot steel from the furnace to be placed in the machine. As he conveyed it to the machine, the hot end came in contact with the respondent's left eye, while he was in a stooping position looking after the fallen steel. This is the injury for which recovery is sought.

The action was tried upon the amended complaint, which will be referred to here as the complaint, the answer, containing affirmative defenses, and the reply. The complaint specifically alleged that the action was brought under an act of the legislature of the state of Idaho relating to the liability of employers to employees.

The first question is whether the evidence in the case brings it within the provisions of that act. It is there provided, among other things, that:

"Section 1. Every employer of labor in or about a . . . mine . . . shall be liable to his employe or servant for a personal injury received by such servant or employe in the service or business of the master

or employer within this state when such employe or servant was at the time of the injury in the exercise of due care and diligence in the following cases: . . . (3). When such injury was caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer so to instruct." Laws of Idaho, 1909, p. 34, § 1.

It is not claimed that the injury in this case was caused by any one acting in obedience to particular instructions given by any person with the authority of the employer. The other provisions of subdivision 3 make the employer liable when the injury was caused by reason of the act or omission of a person, done or made in obedience to the rules and regulations or by-laws of the master or employer. Under the facts of this case the respondent and the helper, in the method adopted for sharpening the steel, were not doing so in obedience to any rules and regulations or by-laws of the employer.

The evidence is clear, and not subject to controversy, that, when the respondent first entered the employment, he and the helper, who had previously been there, talked over together and agreed upon the method by which they would perform the work. It cannot be said that such an agreement between these parties comes within the provision of the statute relating to rules and regulations or by-laws promulgated by the employer. There is no merit in the contention that the proviso referred to enlarges the scope and meaning of the declaring part of the statute, for two reasons; first, the function of a proviso attached to a statute is a restraint upon, an exception to, or a modification of, something which appears in the declaring part of the

Oct. 1919]

Opinion Per MAIN, J.

act. *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766; and second, the proviso of the statute relied upon does not purport to extend the scope of the class of persons that come within it beyond those mentioned in subdivisions 1, 2, 3 and 4. The facts do not bring the case within the statute.

It is next contended that, even though the proof failed to show liability under the statute, the respondent had a right, under the allegations of the complaint and the proof in support thereof, to recover at common law. It is alleged in the complaint that Klodt, the helper, had defective eyesight; that he was incompetent and reckless, and that the accident was caused by reason of his incompetency, negligence and carelessness. There was evidence as to incompetency and negligence. This evidence, even though disputed, and though we might be of the opinion that the greater weight of evidence was against it, would be sufficient to sustain the verdict and judgment, unless the respondent is charged with the assumption of such risk. The risk would be assumed by the respondent unless he has brought himself within the rule that, where a complaint is made to the employer by an employee, of the incompetency of another employee, making known his unwillingness to continue in the employment unless the dangerous situation is relieved, and assurance is received that such dangerous situation will be relieved, and that the employee relied upon the assurance and thereafter continued in the employment until the time of the accident, the doctrine of assumed risk does not apply. *Labatt, Master and Servant*, § 419; *Coulston v. Dover Lumber Co.*, 28 Idaho 390, 154 Pac. 636; *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.*, 62 Wash. 1, 112 Pac. 939.

Respondent testified that, on two occasions, he complained to the master mechanic of the appellant and

requested him to make a change in helpers; that Klodt, the helper, could not see good and was reckless. He further testified that the master mechanic said he would see what he could do about it. This testimony, even though denied by the master mechanic, must, for present purposes, be accepted as true. There was nothing in the evidence which would tend to show that the respondent had given the master mechanic to understand that he was unwilling to continue in the employment unless the cause of danger was removed. Neither is there anything from which it can be inferred that he relied upon any assurance given him by the master mechanic, and that he continued in the employment for that reason. It must be held, treating the case as an action at common law, that the respondent assumed the risk. In determining this question, there being no proof as to what the law of Idaho upon the question is, it must be assumed that the law of that state is the same as the common law of this state, and that a state of facts existed which would permit us to apply such law.

The judgment will be reversed, and remanded with instructions to the superior court to dismiss the action.

MACKINTOSH and MITCHELL, JJ., concur.

ON REHEARING.

[*En Banc*. February 17, 1920.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is reversed and remanded with instructions to the superior court to dismiss the action.

Oct. 1919]

Opinion Per FULLERTON, J.

[No. 15394. Department Two. October 1, 1919.]

ANDERSONIAN INVESTMENT COMPANY, *Appellant*, v.
T. W. WADE, *Respondent*.¹

LANDLORD AND TENANT (129)—UNLAWFUL DETAINER—DEFENSES—EQUITABLE ESTOPPEL. In unlawful detainer of leased premises in lawful possession, upon an attempted forfeiture of the lease for breach of conditions, the tenant may present a defense, legal or equitable, excusing the breach, and may show equitable estoppel to enforce the conditions.

EVIDENCE (168-173) — TO VARY WRITING — CONTEMPORANEOUS OR SUBSEQUENT AGREEMENTS. While a parol agreement contemporaneous with the signing of a written lease, may not, standing alone, be shown contradicting the terms of the lease as to the exclusive use to which the property was put, yet parol evidence is admissible to show that subsequently one of the parties acted upon and the other acquiesced in an oral addition to or modification of the written contract.

ESTOPPEL (48, 54)—LANDLORD AND TENANT (40, 129)—WAIVER OF FORFEITURE. A landlord is estopped to declare a forfeiture of a lease for breach of conditions as to the purposes for which the premises could be used, where he permitted the tenant to occupy the premises in contravention of the terms of a written lease during the entire period of the first term, and his agent gave express consent to continue to do so during the second term and to alterations for that purpose, which the tenant made at considerable trouble and expense.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 19, 1919, upon findings in favor of the defendant, in an action of forcible entry and detainer, tried to the court. Affirmed.

Piles & Halverstadt (F. C. Reagan, of counsel), for appellant.

Dudley G. Wooten, for respondent.

FULLERTON, J.—In February, 1917, the appellant, Andersonian Investment Company, being the lessee of

¹Reported in 184 Pac. 327.

a certain building in the city of Seattle, sublet a storeroom therein, at a stated monthly rental, to the respondent, Wade, for a term of one year. The lease to Wade was in writing, and contained a stipulation that the storeroom was to be used "for the purpose of conducting therein the sale of automobile accessories and for no other purpose," and the further stipulation that "the lessee was not to make any alterations, additions or improvements in said premises, without the consent of the lessor in writing first had and obtained." The lease contained the usual stipulations for forfeiture in the case of nonpayment of rent, and left it optional with the lessor to declare the lease forfeited and the term ended for a breach of the other conditions, reciting that it was mutually covenanted and agreed between the parties that a waiver by the lessee of any covenant, agreement, stipulation or condition of the lease should not be construed as a waiver of any succeeding breach of the same covenant.

As originally constructed, the room had a balcony midway between the floor and ceiling, extending from the front of the room towards the back for about three-fourths of the distance, and for the full width of the room, save about nine feet, reached by a stairway leading upwards from the floor. While there is a dispute in the evidence concerning the fact, it was overwhelmingly proven that, at the time the negotiations were in progress which led up to the lease, the respondent stated to the agent of the appellant, who negotiated on its behalf, that he desired to use the space above the balcony as a living apartment for himself and his family, and desired some additions made thereto to make the place more suitable for that purpose. The agent agreed that these additions might be made, agreeing further to pay the bills for the materials necessary to make the additions. When the written lease was pre-

Oct. 1919]

Opinion Per FULLETON, J.

sented for signature, it was noticed by the respondent that it limited the use of the room to the sale of automobile accessories and contained no provision for the addition requested. Payment of a check theretofore given for the first month's rent was countermanded and the matter taken up with the agent. He refused to make any change in the lease as written, but assured him that the limitation in the lease with regard to the purposes for which the room might be used was mere "matter of form," and that he would not be molested if he used the balcony for living purposes, and at the same time gave the respondent a writing, consenting to the additions to the balcony floor and agreeing in the writing to furnish the materials necessary for that purpose. The respondent executed the lease and later took possession of the room, moving his stock of merchandise to the lower floor and his household goods to the balcony, and continued to use the balcony as a living room during the remainder of the time the lease was in force.

The terms of the lease just mentioned ran from March 1, 1917, to March 1, 1918, at a rental, payable monthly in advance, of \$30 per month. On February 1, 1918, the respondent sent for the agent of the appellant, with whom he had negotiated the lease, and made known to him his desire to continue in the occupation of the room for an additional term. He also made known to the agent his desire for further additions to the balcony floor in order to make it more suitable for living purposes; he desired to extend it so as to include and cover the entire space, cut a door in the wall to a stairway which led up from the outside of the building to certain apartments on the floor above, remove the stairway entirely which led from the storeroom floor to the balcony floor, and to remove a lavatory, which was constructed in a corner of the storeroom, to the

balcony floor, and install in connection therewith a bath tub. The discussion concerning these changes was had with the agent while on the balcony floor, which the respondent was then using for living apartments. It was also stated to the agent that the respondent could not afford to go to the expense necessary to make the changes unless he could have a lease of the room for two years from the expiration of his present lease. The agent consented to the changes, and on the next day caused his principal, the appellant, to execute a new lease to the respondent for a term extending from March 1, 1918, to March 1, 1920, at a monthly rental of \$35 per month for the first year of the term, and \$42.50 per month for the second year. This lease, like the former one, contained the recital that the lessee should use the premises for the sale of automobile accessories, and for no other purpose, and contained the same provisions for a forfeiture in case of a breach of any of its covenants as was contained in the original lease.

The lease was executed by both parties in triplicate, a copy being delivered to the respondent, who signed an indorsement on one of the copies retained by the appellant, which recited that the respondent had received and accepted a duplicate of the lease and had no understanding, verbal or otherwise, differing from it. At the time of the delivery of the lease, a letter was delivered therewith, granting the respondent leave to cut the door mentioned, subject to the approval of the owner of the building, and on condition that the wall should be replaced, if requested, at the cost of the respondent, on the termination of the tenancy. Nothing was said in the letter concerning the additions to the balcony floor, the removal of the lavatory, the addition of a bath tub, or the use of the space above the balcony floor for living apartments. After the execution of the lease, the respondent obtained the consent of the owner

Oct. 1919]

Opinion Per FULLERTON, J.

of the building to cut the door mentioned. He was obligated also to obtain the consent of the city authorities of the city of Seattle to make this change, as well as to make the additions to the balcony floor, the same not being in the original permit to construct the building, which he did at the expenditure of considerable time and money. After these preliminaries were settled, the respondent made the changes as contemplated, at an expense to himself, as the court found, "in the neighborhood of \$400."

On July 29, 1918, the appellant, claiming to have discovered for the first time that changes had been made in the leased storeroom in addition to those authorized by the letters delivered with the leases, and that the premises were being used in part for living rooms, wrote a letter to the respondent, calling attention to these changes and declaring a forfeiture of the lease. The letter stated further, however, that the appellant did not wish to be arbitrary, and that, if the respondent so desired, a new lease could be entered into in keeping with the changed conditions. The respondent disregarded the notice contained in the letter, and later the present action was begun under the statutes of forcible entry and detainer to oust him from the premises. At the trial, on the foregoing facts appearing, the court held the appellant estopped to declare a forfeiture of the lease, and entered judgment to the effect that the appellant take nothing by its action. This appeal is from the judgment so entered.

It is the appellant's first contention that the defense interposed, and that which the trial court found controlling, is an equitable defense and is not available to a defendant in this form of action. Cases from this court are cited where the rule is stated in language as broad as the contention implies, and it is on these cases that the appellant relies to maintain its position.

But while the rule as thus announced was applicable to the facts of the particular cases then under consideration, we think it too broad as a rule of uniform application. The statutes relating to forcible entry and detainer define many acts against which the summary remedy therein provided for is applicable; acts which differ widely in their nature and effect. To illustrate: It declares a person guilty of forcible detainer who, in the nighttime, or during the absence of the occupant of real property, enters therein, and who, after demand of the occupant, refuses to depart therefrom; and it declares a tenant guilty of unlawful detainer who continues in possession of leased property after a breach of the covenants of his lease, and who refuses, on demand of the landlord, to comply with the covenants within a stated time. Manifestly there is in these acts a widely different degree of moral turpitude. In the first, it is but just to say that the guilty party, however well founded his right of entry or his claim of right of possession may be, shall let go his hold before he is permitted to try out his claim of right. He is not thereby deprived of his right to such a trial, and can usually lose nothing more than the rental value of the property while his rights are in process of litigation. But it is not so in the other case. The possession of the tenant is originally lawful, and is so presumed until the contrary appears. If wrongfully ousted, he has usually no adequate remedy, since his remedy is in damages, which may fail for want of a proper measure, or for want of ability on the part of the landlord to respond. More than this, he should not be ousted except for a wrongful breach of the conditions; and, clearly, if facts exist which would excuse the breach, whether these facts present a defense, legal or equitable, he ought to be permitted to show them before an actual ouster. We cannot conclude, therefore, that a

Oct. 1919]

Opinion Per FULLERTON, J.

defendant in an unlawful detainer action can in no case present an equitable defense; his right to do so, we think, must depend upon the acts which give rise to the action. If he acquires possession lawfully and it is sought to oust him because of his subsequent acts, he may defend by setting up any defense which will justify his acts. On the other hand, if his possession was wrongfully acquired, or if acquired under circumstances where to permit him to hold possession would violate the express provisions of the statute, he may not defend by showing right of possession, either legal or equitable.

But this court has not uniformly applied the rule for which the appellant contends. In *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, an action of forcible detainer, the defendant pleaded facts by way of an equitable estoppel, and this court sustained a judgment in his favor based on such facts, notwithstanding the objection of the plaintiff that such a defense was not available because of the nature of the action. Other instances where this principle is recognized, although not directly presented, can be found in the following cases: *Teater v. King*, 35 Wash. 138, 76 Pac. 688; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871, 132 Am. St. 1071; *Hutchinson Investment Co. v. Van Nostern*, 99 Wash. 549, 170 Pac. 121.

The next contention is that the evidence by which the estoppel pleaded was sought to be established violated the parol evidence rule. It is true, undoubtedly, if the right of the respondent to make the alterations in the room and use it for purposes other than those stipulated in the written leases rested alone on the agreement he had with the agent, the evidence concerning the agreement could not be considered, since the agreement was prior to, or contemporaneous with, the sign-

ing of the written lease, and, under the parol evidence rule, is presumed to have been merged therein. But the evidence here goes much farther than this; it not only shows the parol agreement, but it shows a subsequent acting on the agreement by one of the parties, to his detriment if it is not to be recognized, under circumstances charging the other party with knowledge of his acting, and under circumstances making it the duty of the other party to speak if recognition of the agreement was not intended. While the rule known as the parol evidence rule is usually referred to as a rule of evidence, it is more properly a rule of substantive law, since it is a rule of substantive law and not any rule relating to the admissibility of evidence that gives the rule effect. In other words, it is the law and not a rule of evidence that conclusively presumes the finality of written agreements. When, therefore, the acts and conduct of the parties to a written agreement, occurring subsequent thereto, show an addition to or a modification of a written agreement, or the acts of one party, acquiesced in by the other, show such modification, no rule of evidence precludes a showing of the entire transaction, even if a part thereof is a parol contemporaneous agreement adding to, varying, or modifying a written agreement. The parol evidence rule is intended to prevent, not to promote frauds, and it would be a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do so, where the other, on the faith of the agreement, has acted thereon to his detriment.

The remaining question is whether the facts are sufficient to justify the judgment entered. We think they are, on the principle of estoppel. As was said by Judge Dunbar, in *Carruthers v. Whitney*, 56 Wash. 327, 105 Pac. 831, 134 Am. St. 1114:

Oct. 1919]

Opinion Per FULLERTON, J.

“Estoppel is an equitable proceeding, or speaking more accurately perhaps, it is the equitable result of a wrongful proceeding or act, a reliance upon which would, in the absence of an estoppel, work an injustice to an innocent person. At the common law estoppel was founded on deeds and records of courts, but estoppel in equity is estoppel *in pais*. The principle now applies because it has been found that the common law rule was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, and hence the equitable estoppel of the present day. The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage.”

So Judge Morris in the case of *Rogers v. Reynolds*, 95 Wash. 470, 164 Pac. 80:

“Neither is it necessary to point to any special word or act on the part of those now represented by appellant to justify an estoppel. For an estoppel will be created by silence, where it operates as a fraud, as effectually as by spoken word or overt act. Estoppel is a doctrine enforceable by the courts whenever the equities of the particular case demand it. Sometimes it may be predicated upon word or action, sometimes upon the lack of them; but whatever its origin, it is invoked in the interest of equity and good conscience.”

The facts of the present case bring it within these principles. The respondent was permitted to occupy the room in contravention of the terms of the written lease during the entire period of his first tenancy, without remonstrance or objection of any kind on the part of the appellant. He was so occupying it at the time the lease was renewed, and express consent was then given him not only to continue to do so, but to make alterations thought by him to make the place more

suitable for this purpose. On the faith of the promise he went to the trouble of getting a permit from the city authorities to make the alterations, and spent a large sum of money in making them. In spite of their denials, we think the facts justify the conclusion that the appellant's principal officers had knowledge of these facts. But, if they did not, the agent had such knowledge, and the appellant is chargeable therewith. To permit it now to claim a forfeiture of the conditions of the lease would be to permit it to take advantage of its own wrong and perpetrate a fraud upon the respondent. This it should not be permitted to do.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MOUNT, and BRIDGES, JJ.,
concur.

[No. 15262. Department Two. October 8, 1919.]

H. W. HEITMILLER *et al.*, Appellants, v. J. W. PRALL
et al., Respondents.¹

NEW TRIAL (23)—GROUNDS—CONFLICTING EVIDENCE. Error cannot be predicated upon the refusal to grant a new trial for insufficiency of conflicting evidence which made a case for the jury.

TRIAL (89)—INCONSISTENT OR CONTRADICTORY INSTRUCTIONS. In an action by a tenant for loss of crops through the landlord's breach of covenants to install a pump, in which defendant put in issue the plaintiff's allegation as to due care in attending an orchard, and set up a counterclaim for loss of defendant's share of the crop, instructions withdrawing the counterclaim on defendant's failure to show the amount of the damage are not misleading or inconsistent with instructions requiring the plaintiff to show that he substantially performed the contract.

APPEAL (433)—HARMLESS ERROR—FAVORABLE TO APPELLANT. In an action to recover substantial damages, error in instructing that nominal damages can be recovered if there was a breach of the contract and no substantial damages proven, is error favorable to the plaintiff of which he cannot complain.

¹Reported in 184 Pac. 334.

Oct. 1919]

Opinion Per FULLETON, J.

PLEADING (112, 113)—AMENDMENT—CHANGE IN CAUSE OF ACTIONS. In a tenant's action for damages for breach of the landlord's contract to install a pump, it is not error, at the conclusion of the evidence, to refuse an amendment of the complaint to show fraud and false representations inducing plaintiff to enter into the lease, as it would change the form of action and require a retrial.

Appeal by plaintiffs from a judgment of the superior court for Yakima county, Taylor, J., entered July 11, 1918, upon the verdict of a jury rendered in favor of the plaintiffs for nominal damages, in an action on contract. Affirmed.

Snively & Bounds, for appellants.

E. M. Heyburn, for respondents.

FULLETON, J.—On April 14, 1917, the respondents Prall were the owners of certain lands situated in Yakima county, and on that day leased the same for one year to the appellants Heitmiller. The land had upon it a matured orchard of about twelve acres, and the remainder of the land was suitable for growing grains and grasses for hay and for growing garden vegetables. It is in the arid region and irrigation is necessary to produce crops of any sort. The source of supply for water is an artesian well, situated on the premises, which flows during the winter season and spring, usually down to about the middle of May, after which time it is necessary to raise the water by means of a pump. At the time of the lease, there was no pump at the well, and the respondents agreed in the lease to "pay the fair and actual cost of installing a pump and electric motor in the artesian well on the premises, . . . The cost of said pump and motor not to cost above \$300." As a consideration for the lease, the appellants agreed to pay the maintenance cost of the pump and motor, properly spray, prune, irrigate and care for the orchard, harvest and sell the fruit grown thereon, and pay to the respondents one-third of the

gross amount received from such sale. Nothing is said in the lease concerning such other crops as might be grown on the land.

The appellants entered on the land under the terms of the lease, caused the orchard to be sprayed and pruned, planted to grain and vegetables certain portions of the land, and opened the irrigating ditches leading from the well to the parts of the land to be irrigated. The water flowed from the well until about the usual time, but the pump was not installed therein until some thirty-six days later. The crops were failures, no marketable fruits or vegetables maturing, and the hay crop was of no material value.

The appellants sought in this action to recover from the respondents damages in the sum of \$6,476.46. They averred a breach of the contract to install the pump, and that the loss of the crops was the result of the breach. After issues joined, the cause was tried to a jury, who returned both a general and a special verdict. In their special verdict they found that the respondents unreasonably delayed the installation of the pump, but further found that the delay was not the cause of the loss of the crops. By their general verdict they found in favor of the appellants in the sum of one dollar. The appellants moved for a new trial, basing the motion on the grounds of inadequacy of the verdict and errors occurring at the trial. The motion was overruled and a judgment entered on the verdict. This appeal is prosecuted from the judgment so entered.

The assignment first discussed is the refusal of the court to grant a new trial on the ground of inadequacy of the verdict. It is asserted that there is abundant evidence in the record which would warrant the jury in finding that the loss of the fruit crop was due to the lack of water during the period intervening be-

Oct. 1919]

Opinion Per FULLERTON, J.

tween the time the well ceased to flow and the time the pump was installed, and that there was no evidence to the contrary. On the first of these contentions we can agree with the appellants, but the second we think is not in accord with the record. It is needless to set forth the testimony or review it at length, but plainly there was evidence from which the jury could well have found that the failure of the orchard crop, the only failure on which a recovery against the respondents could be based, was not due to a lack of water. The appellants had had no previous experience with irrigated orchards, and there was evidence tending to show that they did not commence irrigating as soon as they should have commenced; that they did not apply the water to the orchard to the extent they could or should have done after they did so commence; that the orchard had suffered from neglect in prior years and required more than the usual care to make it produce marketable fruit, and that this care was not given it. While the evidence was conflicting, it was the province of the jury to say on which side the truth lay, a province with which the appellate court has no right to interfere.

It is next complained that the court erred in its instructions to the jury. The respondents, after putting in issue the appellants' allegations to the effect that they had tended and cared for the orchard in a proper manner, set up affirmatively such want of care, and that such want of care caused a loss to them of their interest in the crop to their substantial damage, and demanded judgment against the appellants for such damage. At the trial they offered no evidence as to the amount of the damage suffered by them, and the court withdrew the affirmative defense from the consideration of the jury by the following charge:

“The defendants claim that the plaintiffs failed to properly spray, prune, irrigate and care for the fruit trees, in consequence of which they have become infected and dried up for want of water, so that all were stunted and injured, and some perished, causing a loss to the defendants of \$3,000.00, for which sum they ask judgment against the plaintiffs. This is called a cross-complaint and is denied by the plaintiffs. The defendants have not introduced any evidence in support of such claim and it is therefore withdrawn from your consideration and you must disregard it.”

In another part of the instruction the following was given:

“As I have told you, the plaintiff’s case is founded upon the lease, which makes it incumbent upon the plaintiffs to properly spray, prune, irrigate and care for all the fruit trees on the leased land. In order to entitle the plaintiffs to recover even nominal damages, they must have convinced you by a preponderance of the evidence that they substantially carried out and performed their obligations in the agreement, unless you are also convinced that they were prevented from performing those obligations by omission on the part of the defendants, if any, to install the pump and motor and make the power arrangements within a reasonable time.”

It is contended that these instructions are conflicting, entitling the appellants to a reversal. Counsel say:

“Now in one instruction they [the jury] are told that they need not consider the failure of the plaintiffs to perform their part of the contract, and then in the part of the instruction excepted to they are told that they were to consider, and it was necessary for them to find, that the plaintiffs had performed their part of the contract before they could return a verdict even for nominal damages for the plaintiffs. It is our contention that there was no issue at any time in the case on the failure of plaintiffs to perform their part of the contract. Furthermore, that the evidence,

Oct. 1919]

Opinion Per FULLETON, J.

without contradiction, showed that the plaintiffs did everything they were required to do and even more, and the orchard, up to the time the water was shut off, was in excellent condition and gave every prospect of a bumper crop."

We cannot, however, think the criticism just. Manifestly, in the first instruction, the court was considering the affirmative defense, and the instruction was intended to do no more than withdraw that defense from the consideration of the jury. The second instruction related to the issues made by the allegations of the complaint and the denials thereto, and was clearly pertinent to that issue. There was, therefore, no contradiction in the instructions viewed from a legal aspect; that is to say, the instructions were not so far contradictory that error must be conclusively presumed. The only question then is, Were the jury misled by them? As to this we think the verdict shows conclusively that they were not. No verdict in damages was returned in favor of the respondents, and the verdict as returned is clearly within the issues as made by the allegations of the complaint and the denials thereto. More than this, the instructions as a whole were so clear on the point as to leave no possible doubt as to the court's meaning. The other contentions made in this connection are sufficiently answered by what we have said concerning the proofs.

The court further instructed the jury that, if they were convinced by the evidence that the respondents failed to install the pump within a reasonable time after the water ceased to flow from the artesian well, the appellants were entitled to recover at least nominal damages, even if they suffered no substantial damages thereby; further instructing them that, if they found certain other facts, the appellants were entitled to recover substantial damages. Citing 8 R. C. L.

423, to the effect that nominal damages are those recoverable where a legal right has been invaded and no actual damages whatever has been or can be shown. The appellant contends that the instruction, in so far as it related to nominal damages, was error, since here actual damages could be shown. But we think the appellant has mistaken the meaning of the writer of the cited text. If we read it correctly, he was distinguishing between those instances where certain of the courts have held nominal damages properly recoverable and where they have held that they are not. For illustration: This court has held that nominal damages are properly recoverable in an action in the form of an action for damages where the recovery of damages is not the gist of the action, but is maintained to vindicate a right of the plaintiff which the defendant has invaded; while, on the other hand, it has held that they are not so recoverable where the gist of the action is the recovery of damages and there is a failure to prove substantial damages. This court is not alone in so holding, although it is not the uniform rule, and the text cited was but marking this distinction; it was not intended to be said that nominal damages could be recovered only in actions where substantial damages could not be proven. But, conceding the instruction to be contrary to our holdings, it is not error of which the appellants can complain. Since the gist of the present action is to recover damages, to instruct that nominal damages were recoverable if they found there had been a breach of contract and substantial damages had not been proven is an error for which the respondents could have complained, but it is not error against the other side. It was error in their favor, not error against them.

The appellants alleged in their complaint that the respondents, through their agents, at the time the

Oct. 1919]

Opinion Per FULLERTON, J.

lease was entered into, represented that there was plenty of water to irrigate the land, and that, when applied to the land, it would produce maximum crops of both fruit and produce, and further represented that the pear trees were capable of producing, and would produce, from one to two tons of pears per tree, and it was these representations that induced them to enter into the contract of lease. It was not alleged that these representations were false or fraudulent, and recovery was asked because of a breach of the contract to install the pump. At the trial, by cross-examination of the appellants' witnesses, the respondents sought to show that there was some alkali in the soil of a part of the land, and that the trees had been neglected in prior years, which facts tended to render the orchard less productive than it otherwise would have been. At the conclusion of the evidence, the appellants asked leave to amend their complaint so as to show false representations and deceit, and asked to have the jury instructed on this theory. The court refused to allow the amendment, and its refusal is assigned as error. But we find no error in the ruling. The action as instituted was one in damages for a breach of contract, and the effect of the amendment sought to be made was to change it into an action for false representations and deceit. This would have changed its entire scope and nature, and would have required a practical retrial of the case. Whether it would have been an abuse of discretion to have granted the motion, we need not consider. We are clear that it was not so to deny it.

There is no reversible error in the record, and the judgment will stand affirmed.

HOLCOMB, C. J., MOUNT, PARKER, and BRIDGES, JJ., concur.

[No. 15368. Department Two. October 8, 1919.]

THE STATE OF WASHINGTON, *on the Relation of J. B. McMillan, Appellant*, v. JAMES A. MILLER, as *Auditor of Whatcom County, Respondent*.¹

LIMITATION OF ACTIONS (17-1)—IMPLIED CONTRACTS—COUNTIES—OFFICERS—RECOVERY OF COMPENSATION FOR SERVICES. Upon the rendition of services by a county commissioner for which the law fixed an unchanged compensation during the whole period, there arises an implied obligation of a contractual nature to pay such compensation, governed by the three-year statute of limitations, Rem. Code, § 159, for actions on contracts, express or implied.

SAME (36)—ACCRUAL—MUNICIPAL OBLIGATIONS—SALARY OF OFFICERS. Under Rem. Code, § 4075, providing that the salary of county officers shall be paid and warrants therefor drawn monthly on the first Monday of each month, a right of action therefor accrues each month, notwithstanding the salary is fixed by Id., § 4037, at \$1,800 "per annum."

Cross-appeals from a judgment of the superior court for Whatcom county, Hardin, J., entered February 8, 1919, upon findings favorable to the plaintiff, in an action for a writ of mandate to compel the issuance of a salary warrant. Affirmed.

Walter B. Whitcomb, for appellant.

Loomis Baldrey and *Frank W. Radley*, for respondent.

PARKER, J.—The relator, McMillan, commenced this action in the superior court for Whatcom county, seeking a writ of mandate to compel the auditor of that county to issue to him a warrant in compliance with an order of allowance made by the board of county commissioners for a balance of \$3,050, claimed to be due him for services rendered as county commissioner during the period of approximately four years from

¹Reported in 184 Pac. 352.

Oct. 1919]

Opinion Per PARKER, J.

January, 1915, to October, 1918, inclusive. The superior court awarded recovery to McMillan in the sum of \$2,400, and caused to be issued its writ of mandate directing the county auditor to issue a warrant accordingly. The court rested its judgment upon the theory that all but \$2,400 of McMillan's claim was, at the time of its allowance by the board and at the time of the commencement of this action, barred by the three-year statute of limitations. From this disposition of the cause, McMillan has appealed, contending that no part of his claim was barred at the time of its allowance by the board and the commencement of this action. The auditor has also appealed, contending that the two-year statute of limitations is controlling in this case, and that all of that portion of McMillan's claim accruing more than two years prior to its allowance by the board and commencement of this action is barred.

The controlling facts are not in dispute and may be summarized as follows: From January 11, 1915, until the commencement of this action in the superior court on December 3, 1918, McMillan was a duly elected, qualified and acting commissioner of Whatcom county. That county was at all the times in question a county of the fifth class, and it is here conceded by counsel on both sides that McMillan was entitled to receive for his services as such commissioner compensation payable by the county at the rate of \$1,800 per year, as provided by Rem. Code, § 4037. For services rendered by McMillan as commissioner during each of the months from January, 1915, to October, 1918, he was, between the first and seventh days of each of the following months, respectively—and we assume on the first Mondays thereof—paid for such services, upon a per diem basis, sums averaging \$83.33 for each of such previous month's services. During his three years'

service from November, 1915, to October, 1918, inclusive, he was so paid for eleven months' services in each of those years \$85 per month, and for one month's service in each of those years \$65 per month, which, it will be noticed, resulted in his receiving \$1,000 for services rendered in each of those three years, being \$800 less than he was in law entitled to in each of those years. He was paid in substantially the same manner as to times and amounts of payments for the portion of the period here in question, from January to October, inclusive, in the year 1915. McMillan was so paid for his services as commissioner because of what is here conceded to be a mistake of law on the part of the county officers, including himself, that a county commissioner of Whatcom county was entitled to receive compensation at the rate of five dollars per day for services actually rendered, and in no event to exceed \$1,000 in any one year. On December 2, 1918, McMillan filed with the board of county commissioners his claim for a balance of \$3,050, claimed to be due him for services rendered by him as commissioner for the whole period of approximately four years here in question. The claim being allowed by the board, and the auditor having refused to issue a warrant in payment thereof as ordered by the board, this action was commenced by McMillan on December 3, 1918.

The only provisions of our statutes of limitation which could have any application here are, referring to sections of Rem. Code, the following:

"Sec. 155. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, . . .

"Sec. 159. Within three years. . . . 3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument; . . .

Oct. 1919]

Opinion Per PARKER, J.

"Sec. 165. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

We shall first determine whether the two-year statute or the three-year statute is controlling as to the limit of time within which McMillan was required to seek recovery in court of his compensation following the accrual of his cause or causes of action therefor. This question arises upon the contention here made on behalf of the auditor that the trial court erred to the prejudice of the county in awarding McMillan the whole of the unpaid portion of his compensation at \$800 per year for the three-year period from November, 1915, to October, 1918, inclusive. This contention is rested upon the theory that the obligation on the part of the county to pay McMillan compensation for his services as commissioner, even after the rendering of such services, is not contractual in its nature, either express or implied, and that therefore the two-year statute is controlling. Assuming, then, for argument's sake, that the words "contract or liability, express or implied," found in the three-year statute above quoted, refers exclusively to contractual liabilities, our problem is reduced in its last analysis to the question of whether or not the obligation of the county to pay McMillan for his services, after their rendition, became contractual in its nature. Plainly, if such be the nature of the obligation, the three-year statute is controlling in this case, while if the obligation is not contractual in its nature, the two-year statute is controlling. Counsel for the auditor invoke the general rule that the election or appointment of a public officer does not create any contractual relationship between such officer and the state, county or municipality under which he holds his office. While this is a well-established rule of law by all of the authorities in so far as they

have come to our notice, it seems to be equally well established by no less an authority than the supreme court of the United States that, upon the rendition of services by a public officer, for which services compensation has been prior to the rendition thereof, fixed by or in pursuance of law, and, so fixed, remains unchanged during the whole of the period during which such services are rendered, there does arise an implied obligation of a contractual nature on the part of such state, county or municipality to pay for such services at the rate of compensation so fixed, in the sense that such obligation cannot be impaired without violating the guaranty of § 10, art. 1 of the constitution of the United States that "No state shall . . . pass any . . . law impairing the obligation of contracts . . ."

In the case of *Fisk v. Jefferson Police Jury*, 116 U. S. 131, the supreme court of the United States, having under consideration the claimed right of Fisk, a district attorney of the state, to have levied a tax by the police jury (which was the parish tax-levying body corresponding to our county commissioners) to pay a judgment rendered in his favor in the state court for compensation due him from the parish, to which he was entitled under the laws of the state in force at the time of the rendition of his services, which obligation on the part of the parish was in effect impaired by a subsequent amendment to the constitution of the state, in that the tax levying powers of the police jury were so impaired as to in effect prevent raising sufficient funds, as it was claimed, to pay such judgment; and the courts of the state for that reason having denied to Fisk the relief prayed for as against the police jury and the parish, Justice Miller, speaking for the supreme court of the United States—the cause being in that court on writ of error to the supreme court of the state of Louisiana—said:

Oct. 1919]

Opinion Per PARKER, J.

"In answer to the argument that, as applied to plaintiff's case, the constitutional provision impaired the obligation of his contract, the Supreme Court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary, or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.

"It seems to us that the Supreme Court confounded two very different things in their discussion of this question.

"We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. *Butler v. Pennsylvania*, 10 How. 402.

"But, after the services have been rendered, under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the supreme court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note.

"The case of Fisk was of this character. His appointment as district attorney was lawful and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. *Hall v. Wisconsin*, 103 U. S. 5, 10; *Newton v. Commissioners*, 100 U. S. 548, 559.

"The provision of the constitution restricting the limit of taxation, so far as it was in conflict with the act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy *pro tanto*.

"It is apparent that if the officers whose duty it is to assess the taxes of this parish, were to perform that duty as it is governed by the law of 1871, the plaintiff would get his money. If not by a first year's levy, then by the next. But the constitutional provision has repealed that law, and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.

"It is well settled that a provision in a state constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that as it regards plaintiff's case this restrictive provision of the constitution of 1880 does impair the obligation of a contract. *Von Hoffman v. Quincy*, 4 Wall. 535; *Nelson v. St. Martin's Parish*, 111 U. S. 716.

"The judgments of the supreme court of Louisiana are reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion."

That decision was not dissented from by any of the justices, and we think has not since its rendition been

Oct. 1919]

Opinion Per PARKER, J.

in the least impaired as an authoritative declaration that, upon the rendition of services by a public officer under such circumstances, the obligation to pay him therefor becomes contractual in its nature. Counsel for the auditor relies upon the later decision of the United States supreme court in *Morley v. Lake Shore & Michigan Southern R. Co.*, 146 U. S. 162, as in effect modifying its views so expressed in the above quoted language. That case, however, involved only the question of whether or not the obligation to pay a statutory prescribed rate of interest on judgments rendered in a state court was contractual in its nature, in the sense that such obligation could not be impaired by a change of the statute after the rendition of such judgment, as to future accruing interest thereon. It was held that such rate could be so changed without impairing any contractual obligation, because such obligation was purely statutory and not contractual. We do not think that decision evidences any change of view of the supreme court of the United States as to the contractual nature of an obligation arising in favor of an officer to pay him for services, upon the rendition of such services, as expressed in the above quoted language from the *Fisk* case. We note that the decision in the *Morley* case was dissented from by three of the justices. The following decisions all seem to recognize that the obligation to pay an officer for services rendered, there being a legally fixed compensation while such services are being rendered, is an implied contractual obligation which arises upon the rendering of the services, though also recognizing the general rule that there does not arise any contractual relation of any nature between the officer and the state, county or municipality which he serves, by virtue of the mere fact of his appointment or election: *County of Lancaster v. Brinthal*, 29 Pa. St. 38; *Smith v. Mayor, etc., of*

New York, 37 N. Y. 518; *City of Hoboken v. Gear*, 27 N. J. L. 265, 278; *Locke v. City of Central*, 4 Colo. 65, 34 Am. Rep. 66.

In the last cited case, quoting from the New Jersey case, it is said:

“An appointment to a public office, therefore, either by the government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is, at most, a contract that while the party continues to perform the duties of the office he shall receive the compensation which may from time to time be provided by law.”.

There can be found expressions in the text books and decisions, and even in our own decisions of *Bartholomew v. Springdale*, 91 Wash. 408, 156 Pac. 1090, Ann. Cas. 1918B 432, and *Rhodes v. Tacoma*, 97 Wash. 341, 166 Pac. 647, seemingly out of harmony with this view of the law; but we think, when critically read, such expressions will have been found to have been used in a very general sense without reference to or thought of the particular problem with which we are here confronted. As to such expressions used in our own decisions, we think none of them was in such connection with facts under consideration as to become *stare decisis* and controlling in our present inquiry.

Counsel for the auditor calls our attention to, and places reliance upon, our decision in *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928, wherein we held that the obligations of each county to the other touching their property rights and debt obligations, upon the creation of Grant county from a portion of the territory of Douglas county, were not contractual, but purely statutory in their nature, being prescribed and measured by the terms of the act of

Oct. 1919]

Opinion Per PARKER, J.

the legislature creating Grant county from a portion of the territory of Douglas county; and hence that the two-year statute of limitations controlled in so far as either county had the right to resort to the courts to enforce settlement of its property rights and debt obligations as between themselves. We do not think that decision is controlling in this case, since the division of Douglas county and the creation of Grant county was not a matter of contract in any sense, on the part of either, nor could one become legally liable to the other upon the claim involved in that action save by virtue of the statute creating Grant county from a portion of the territory of Douglas county.

We now feel constrained to hold, in the light of the decision of the supreme court of the United States above quoted from, notwithstanding expressions in the authorities and even in our own decisions seemingly somewhat out of harmony therewith, that the obligation on the part of Whatcom county to pay McMillan for services rendered by him as county commissioner became contractual in its nature upon the rendition of such services, and that therefore the three-year statute governs as to the time within which he was required to seek recovery in the superior court upon his cause or causes of action for compensation for his services.

When did the statute start to run as against McMillan? While Rem. Code, § 4037, fixes the compensation of county commissioners at \$1,800 per annum for counties of the class to which Whatcom county belongs, in § 4075, Rem. Code, we read:

“The salaries of such officers named in this act as are entitled to salaries shall be paid monthly out of the county treasury, and from the funds hereinbefore provided, and it shall be the duty of the county auditor, on the first Monday of each and every month, to draw his warrant upon the county treasurer in favor of

each of said officers for the amount of salary due him, under the provisions of this act, for the preceding month: *Provided*, The county commissioners shall have entered an order on the record journal empowering him so to do."

This language, we think, renders it plain that there accrued to McMillan upon the first Monday of each month the right to receive a warrant in payment for his previous month's services. It is true this section authorizes the county auditor to issue such warrant only upon order of the county commissioners, but it is plain, we think, that, if the county commissioners neglected to make such an order so as to authorize the issuance of such a warrant on that day, he would be entitled to seek relief in the courts compelling them to make such order, as well as to compel the auditor to issue a warrant in pursuance thereof. In other words, it was upon the first Monday of each month that his right of action accrued entitling him to seek relief in the courts to recover his salary earned during the previous month. It is elementary law, as stated in 17 R. C. L. 749, that

"... a cause of action accrues the moment the right to commence an action comes into existence."

We make these observations in response to the contention that the statute did not commence to run until the end of each year because the salary is referred to in § 4037, Rem. Code, as being "eighteen hundred dollars per annum." We conclude that a cause of action accrued to McMillan on the first Monday of each month for compensation for his previous month's services, and that § 4037, Rem. Code, only controls the rate of compensation.

Since it appears that McMillan's causes of action for each month's salary for services rendered during the three-year period from November, 1915, to October,

Oct. 1919]

Statement of Case.

1918, inclusive, accrued within three years preceding the commencement of this action, and there is still due him from the county for such services the sum of \$2,400, and the balance of his claim is barred by the three-year statute, we conclude that the judgment of the superior court awarding him recovery in that sum must be affirmed. Since both parties have appealed and neither been successful here, neither will be awarded costs in this court.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MOUNT, JJ., concur.

[No. 15221. Department One. October 10, 1919.]

AUGUST SCHULZE, as *Pacific Coast Pole Company*,
Respondent, v. GENERAL ELECTRIC COMPANY,
Appellant.¹

SALES (12)—CONTRACTS BY CORRESPONDENCE. There was no meeting of the minds and no completed contract by correspondence for the purchase of poles where, although prices quoted were apparently accepted, in view of changes and new conditions which appeared in each interchange, the buyer, before mailing acceptance, requested telegraphic reply, and the seller then countered by materially changing date of delivery, terms of payment and price, and the changes were never agreed to.

TRIAL (53)—QUESTIONS OF LAW OR FACT—CONSTRUCTION OF WRITINGS. Where a transaction consists wholly of letters and telegrams, whether the correspondence constituted a contract is a question for the court.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered September 13, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

¹Reported in 184 Pac. 342.

Post, Russell & Higgins and John M. Gearin, for appellant.

Ripley & Quackenbush, for respondent.

TOLMAN, J.—Respondent, as plaintiff below, brought this action to recover from appellant damages alleged to have been sustained through the refusal of appellant to accept and pay for certain timber products which it is claimed it had contracted to purchase. The case was tried to a jury, and from a verdict and judgment for the full amount demanded, the case is brought here on appeal.

The first and most forcibly presented question is whether the correspondence between the parties shows a meeting of the minds and a consummated agreement or contract. The correspondence began with a letter from appellant asking respondent to quote his best prices for furnishing certain cedar poles and cross-arms to be delivered at Cruz Grande, Chile, shipment to be January 1, 1916. Another letter shortly followed increasing the number of poles to be furnished. Respondent answered to the effect that, as soon as he could get shipping rates, he would make quotations, and thereafter wrote quoting prices, and said: "These prices include cost insurance, freight, duty, and unloading;" stated that delivery would be made during January, February and March, and asked for terms of payment. Appellant replied by night lettergram as follows:

"Dec. 6, 1915.

"We accept your quotation November thirteenth poles and cross-arms, Cruz Grande, Chile, on condition poles meet American Telephone & Telegraph specifications and our inspection before shipment, you to arrange shipment so at least one-third shipped each month, January, February, March. Our representative will arrange unloading destination in four days your

Oct. 1919]

Opinion Per **TOLMAN, J.**

expense. Terms of payment seventy-five per cent against shipping documents, twenty-five per cent on delivery Cruz Grande. Wire if satisfactory; will then mail formal acceptance."

To which respondent sent the following answer:

"Dec. 8, 1915.

"Wire Grace and Co., San Francisco, regarding your shipping request. In answer they raise freight ten cents a foot to discharge five hundred poles a day; demurrage one thousand dollars a day, February, March, April shipment ships option; thinks they can take all on February; what shall we do?"

In due course, appellant sent its answer thereto, which reads:

"Dec. 10, 1915.

"Your night letter eighth. Accept proposition poles for Chile at increased freight rate ten cents per foot. Will unload five hundred poles per day and accept demurrage required. Will mail acceptance on receipt of telegraphic reply."

Although this message appears to accept the terms and conditions theretofore made by respondent, yet, in view of the changes and new conditions which had appeared in each interchange of communications, it not unreasonably called specifically for a telegraphic reply before acceptance. Had there been such a telegraphic reply of acceptance on the part of respondent, clearly we could say that the minds of the parties had met and a contract had been made; or had there been no reply whatever, it might possibly be argued that we should draw the inference from mere acquiescence that the parties had reached a mutual agreement and understanding. Yet the specific request for a reply before acceptance, under many authorities, would be sufficient to show that something was left unfinished and still to be done before the contract could be regarded as completed. *McDonnell v. Coeur d'Alene Lumber Co.*,

56 Wash. 495, 106 Pac. 135; *Stanton v. Dennis*, 64 Wash. 85, 116 Pac. 650. But the facts do not call for the application of that rule here, as respondent, evidently then believing that the contract was not then made, instead of wiring an acceptance as he had been invited to do, proceeded to send a telegraphic reply as follows:

“Dec. 11, 1915.

“Booked Cruze Grande material with Grace and Company San Francisco earliest possible delivery; will secure for cost and freight plus ten per cent; your favor increased cost respectively, poles three sixty and four ten, cross-arms twenty twenty-five and thirty-five; terms twenty per cent, and you prepay freight; will write when to send inspector.”

This telegram changed the date of delivery from January, February, and March, as set forth in the earlier communications, and from February, March and April, as named in the telegram of December 8, to “earliest possible delivery,” which might mean, and under the conditions disclosed by the record probably did mean, something quite different, and which would enable respondent to cast all responsibility for delay upon the transportation companies. It clearly indicated an increased price for both poles and cross-arms; it called for quite different terms of payment; and as the record shows that the seventy-five per cent mentioned in the lettergram of December 6 to be paid against shipping documents would not be more than sufficient to pay the freight, it appears conclusively that respondent was still trying to secure better terms. Though it is not claimed that a contract was made subsequent to the exchange of messages quoted, it is argued that, as appellant in later communications used such expressions as “Consider our orders for the above cancelled,” and as it sent its inspector to Everett to confer with respondent and examine the poles he was

Oct. 1919]

Opinion Per TOLMAN, J.

offering, and something was there said about arbitration when the parties failed to agree as to the size of the poles specified, it thereby admitted an existing contract. We cannot so hold. The quoted expression as to cancellation was expressly based upon unsatisfactory prices and delivery for poles to be furnished by respondent, and meant no more than a refusal to proceed further. The sending of the inspector does not necessarily mean more than a hope or expectation that a contract might be arrived at; and indeed, as the inspector brought with him a contract in written form which he requested respondent to sign, and which, after some delay and temporizing, respondent changed and signed, and which appellant refused to accept as so changed, it seems apparent that the inspector was sent only in the hope that a contract might be arrived at. Upon the whole record, we are satisfied that the minds of the parties never met. At the one time when respondent might have signified his acceptance of the terms and conditions then outlined, and thus secured a binding contract, he, instead of so doing, countered by demanding better prices, terms and conditions, which were never accepted by appellant.

In *Kuh v. Lemcke*, 107 Wash. 45, 180 Pac. 889, we quoted with approval the rule laid down in *Baker v. Johnson County*, 37 Iowa 186, which is:

“An offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new matter. A proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer.”

So here, by his night letter of December 11, respondent rejected the offer contained in appellant's telegram of December 10. These views harmonize in principle

with our many decisions involving contracts made, or attempted to be made, by correspondence. *Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co.*, 107 Wash. 587, 182 Pac. 625; *Sillman v. Spokane Savings & Loan Society*, 103 Wash. 619, 175 Pac. 296; *Richardton Roller Mills v. Miller*, 99 Wash. 654, 170 Pac. 357.

The negotiations between the parties consisting wholly of letters and telegrams, it was for the court to determine, as a matter of law, whether such correspondence constituted a contract, and it therefore follows that the trial court erred in denying appellant's challenge to the sufficiency of the evidence and motion for judgment. Since these views dispose of the case, it is not necessary to consider the other points raised.

The judgment appealed from is reversed, with instructions to grant appellant's motion for judgment in its favor.

HOLCOMB, C. J., MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

Oct. 1919]

Opinion Per FULLERTON, J.

[No. 15278. Department Two. October 10, 1919.]

MARY F. ALLEN, as *Executrix etc.*, Respondent, v. THE
CITY OF SPOKANE, Appellant.¹

MUNICIPAL CORPORATIONS (269)—IMPROVEMENTS—ASSESSMENTS—ACTION TO SET ASIDE. A property owner, in an action to cancel a street assessment, may show that the property improved was not a public street, since the city cannot acquire the property unless the public necessity is judicially determined, nor unless its cost can be found in assessments or within the city's debt limit.

SAME (256)—VALIDITY OF ASSESSMENT—ESTOPPEL. The fact that a property owner petitioned for an improvement and made affidavit that the property was a public street will not estop him from maintaining an action to cancel the assessment when it is found that the property improved was not public property.

HOLCOMB, C. J., dissents.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 30, 1918, in favor of the plaintiff, in an action to cancel the assessment for a local improvement, tried to the court. Affirmed.

J. M. Geraghty and Alex M. Winston, for appellant.
Stephens & Jack, for respondent.

FULLERTON, J.—This action was instituted by the respondent, suing in her own right and in her capacity as executrix of her husband's estate, to cancel an assessment levied by the appellant, the city of Spokane, upon real property, of which the respondent and her husband, subsequent to the time the assessment was levied, became the purchasers. The trial court entered a judgment cancelling the assessment, and the city appeals.

The facts are disclosed by the pleadings. On December 6, 1906, certain owners of real property in the

¹Reported in 184 Pac. 312.

city of Spokane petitioned the board of public works of that city to cause that part of Spokane street lying between Sprague avenue and Third avenue to be improved at the expense of the owners of the property benefited, by grading the same to the established grade for the full width thereof and by building sidewalks upon each side thereof. The land now owned and represented by the respondent abutted upon the proposed improvement; it was then owned by one W. F. Mitchem, who joined in the petition for the proposed improvement. There seems to have been at that time some doubt in the minds of the city officials whether the way petitioned to be improved had been dedicated as a street, or was in fact a part of Spokane street, and to remove this doubt, Mitchem, with other abutting and adjacent property owners, filed affidavits with the board of public works, averring that the way had been "generally, habitually and universally traveled by the citizens and residents of the city of Spokane, and by the public at large, adversely, continuously and uninterruptedly for a period of more than eleven (11) years prior to the date of the affidavit; and that the same has been, during all of said time, and is now, used by said citizens of Spokane and the public at large as and for a public street." The city, in response to the petition, caused the way to be improved and caused the assessment now in question to be levied to pay the cost thereof. The proceedings leading up to the assessment, in so far as the record before us discloses, were regular; the notices required by the form of procedure then in force were duly given, and opportunity to protest against the improvement, the manner in which it was made, and the amount of the levies, were duly given the landowners whose property was assessed. No protest of any kind was made by the then owners of the property now owned by the respondents. The assess-

Oct. 1919]

Opinion Per FULLERTON, J.

ment was made payable in ten annual installments, the first installment falling due on May 15, 1909. Of these installments, Mitchem paid three, namely, the installments falling due in 1909, 1910 and 1911, when he sold the property to the respondent and her husband. The new owners paid the installments falling due during the next four years, namely, the years 1912, 1913, 1914 and 1915. After the last payment, an action was instituted against the city by the person claiming the property improved as a street, wherein it was adjudged that the property was not, and never had been, a public street, but was the private property of the claimant. The present owners then demanded of the city a cancellation of the remaining installments of the assessment. The city refused to comply with the demand, and the present action was begun, with the result first stated.

For reversal the city makes two principal contentions; first, that the question whether the property improved as a street was actually a street cannot be litigated in this form of action; and second, that the respondent is estopped by the acts of her predecessor in interest in the property to question the validity of the assessment.

While the authorities upon the first proposition are not in accord, we think the better rule is that a property owner whose property has been assessed for a purported street improvement may, in an action to set aside the assessment, show that the property improved was not a public street. The cases which announce the contrary doctrine seem to proceed on the theory that the city can acquire the property, and thus make the improvement available to the public and of benefit to the property of the complaining owners. But whatever may be the rule in the states announcing that doctrine, in this state a municipality cannot acquire such

property as it wills for a public street, even though it provide for compensation to the owner for the property taken. By § 16 of article 1 of the state constitution, the question whether the use for which real property is taken is a public use is made a judicial question to be determined as such, without regard to any legislative assertion that the use is public, and while we have held that the determination of the proper municipal officers that the use is public is ordinarily conclusive upon the courts (*Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827; *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358), the cases announcing the rule recognize possible exceptions. The power to decide clearly implies that the courts may decide contrary to the declaration of the municipal officers, and until the question is judicially determined, or the right to such determination waived, it cannot with certainty be said that the property assessed will have the benefit of the improvement.

There is, moreover, another reason for denying the principle for which the city contends. The city may not be able to exercise the power even if it so wills. In this state the power of taxation is limited. The city may find that the sum it can lawfully assess upon abutting property will be insufficient to meet the cost of acquiring the property, and may find that it cannot make up the difference from its general fund because of this limitation on its power of taxation. For the foregoing reasons it is possible that the city may never acquire the property on which the improvement is made, in which case the abutting property will not receive the benefit of the improvement, and clearly, as long as this possibility exists, there is no just principle upon which the assessment can rest.

In support of the second contention, the appellant relies upon the cases of *Barlow v. Tacoma*, 12 Wash.

Oct. 1919]

Opinion Per FULLERTON, J.

32, 40 Pac. 382, and *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874. But these cases differ widely in their facts from the case at bar, and, we think, warrant the application of different principles of law. In them there was no question as to the city's title to the street on which the improvement was made, and, in consequence, no question that the property of the complaining owners received the benefit of the improvement. The defect was in the preliminary proceedings had by the city officers in the initiation of the improvement, and while the court, in the opinions cited, spoke of the defects as jurisdictional, all that was meant was that the preliminary proceedings were so far irregular as to justify a stoppage of the work by the property owners, had they acted in the proper manner and at the proper time. There was, therefore, no injustice in holding them estopped from questioning the assessments levied on their property, and the court could well hold that they were estopped from questioning the regularity of the proceedings by their act of petitioning for the improvement and by their failure to call attention to the defects in the procedure prior to the making of the improvement. Here the facts are different. The property improved as a street was, at the time of the improvement, and still is, in private ownership. The property of the complainant has not received the benefit of the improvement. If he is compelled to pay for the improvement he parts with property for which he receives no return. He had a right to rely on the city's assumption of ownership of the property it improved as a street, and clearly ought not to be held estopped from questioning the assessment, unless he was guilty of some fraud or concealment when he petitioned for and acquiesced in the improvement. As we said in *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192, the petition could be nothing more than a request

to the city that it proceed within the powers conferred on it by law in making an improvement; it could not act as authority to the city to proceed beyond and outside of any legal authority.

It is true in this instance the owner did something more than petition and stand by without protest. He made affidavit as to facts tending to show that the property was a public street, but this we cannot think alters the situation. It is not asserted that he did not state the facts truthfully, and all that he stated in the affidavit that was fairly within his knowledge could be true and still the property not be a public street. The affidavits were but evidence tending to establish the fact of title. The ultimate question was one which the city was required to determine, and it was the only body which had the power to have it effectively determined. Since the title to the property was in doubt, it was the city's duty, before proceeding to improve it as a street, to remove the doubt. Having neglected this duty, it cannot be permitted to visit the loss upon another, who was innocent of wrong, and who had the right to assume that no duty required of the city had been neglected. Contrary to the contention of the city, therefore, we cannot conclude that the property owner was equally guilty with the city in causing the loss which must necessarily follow, or that he must bear it as the person who, by his acts, made the loss possible.

The judgment is affirmed.

MOUNT, PARKER, and BRIDGES, JJ., concur.

HOLCOMB, C. J., dissents.

Oct. 1919]

Syllabus.

[No. 15295. Department Two. October 10, 1919.]

LIBBIE BULLOCK, *Respondent*, v. YAKIMA VALLEY
TRANSPORTATION COMPANY *et al.*, *Appellants*.¹

BOUNDARIES (1)—DESCRIPTION—MONUMENTS AND MARKS. A call in a deed to the south line of a road as then used, which was marked by a fence, being to a monument, controls a description by metes and bounds which would carry it beyond and into the road.

COUNTIES (88-92)—CLAIMS AGAINST COUNTY—DEMAND FOR PAYMENT—SUFFICIENCY. A claim for personal injuries against a county is not insufficient in that it makes no formal demand for payment, when it was sufficient in all other respects.

SAME (90, 95)—CLAIMS—REJECTION—PRESUMPTIONS—ACTIONS—REMEDIES. Under Rem. Code, § 3909, providing that no action shall be commenced against a county until a claim has been presented and disallowed, it will be conclusively presumed, after the commissioners have failed to act within a reasonable time, that they rejected the claim, and claimant may sue at law without resorting to mandamus to force the commissioners to act; and seven months is more than a reasonable time.

SAME (90)—ACTIONS ON CLAIMS—LIMITATIONS—REJECTION OF CLAIM. Under Rem. Code, § 3909, requiring action on a claim against a county to be commenced within three months after rejection of the claim, where the commissioners refused to act within a reasonable time, the claim will be considered rejected as of the time the claimant elected to sue, and the county could not take advantage of its own wrong and claim an earlier rejection barring the right of action.

APPEAL (384)—REVIEW—COPARTIES—FAULT OF COPARTY. Error in admitting evidence by a codefendant, over the objection of both plaintiff and defendant, may be assigned for reversal of plaintiff's judgment, although she was not responsible for the error.

HIGHWAYS (64)—DEFECTS—NOTICE TO COUNTY—PHOTOGRAPHS—ADMISSIBILITY. Photographs showing a dilapidated condition of a county sidewalk generally, are admissible against the county only for the purpose of showing notice of the particular defect which caused the injury; and when offered by a codefendant to show plaintiff's contributory negligence, it is error to fail to limit their effect as against the county.

¹Reported in 184 Pac. 641; 187 Pac. 410.

EVIDENCE (53, 94) — RES GESTAE — ADMISSIONS — STATEMENTS OF AGENT—AFTER TRANSACTION. In an action for personal injuries sustained upon a defective county sidewalk, a letter from the deputy prosecuting attorney referring to the defective condition, written fifteen months after the accident, is not admissible as an admission by an agent, since it was not part of the *res gestae*.

HIGHWAYS (61, 66)—DEFECTS—DUTY OF COUNTY—SIDEWALKS. Under Rem. Code, § 951, making a county liable for injuries from acts or omissions of the county, and §§ 3890 and 5575 authorizing county commissioners to lay out highways and giving them control, a county is liable for negligence in failing to maintain county sidewalks in proper repair.

PLEADING (181-189)—VARIANCE—OWNERSHIP OF "RIGHT OF WAY"—MATERIALITY. In an action against a county and a railroad company for injuries sustained upon a county sidewalk at the railway crossing, failure to prove the company's ownership of the property is not a fatal variance under a complaint merely alleging that the company owned and maintained "a right of way" across the highway; especially where no surprise was claimed.

RAILROADS — HIGHWAY CROSSINGS — MAINTENANCE OF SIDEWALK — LIABILITY—STATUTES. Rem. Code, § 8730, relating to railroad crossings, being entitled an act compelling railroads to fence their right of way and to protect the owners of stock and declaring the law of negligence, has no application to the maintenance of sidewalks at railroad crossings for the convenience of pedestrians.

SAME. Rem. Code, § 9080, authorizing railroads to cross highways, has no reference to the maintenance of crossings and does not affect the common law duty to keep the crossing in reasonable repair.

SAME—HIGHWAY CROSSINGS—SIDEWALKS—COMMON LAW LIABILITY FOR MAINTENANCE. At common law, a railroad company crossing a highway by statutory permission owed the duty to maintain that portion of the highway used and occupied by it, including sidewalks and approaches necessary for a reasonably safe crossing.

TRIAL — SPECIAL VERDICT — ASSENT OF REQUIRED NUMBER. Under Rem. Code, § 358, authorizing a verdict agreed to by ten of the twelve jurors, and § 364, authorizing special findings, a jury is properly instructed that any ten of their number may answer any one of the special interrogatories submitted.

TRIAL (117)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS. An instruction as to the difference between proximate and remote cause is not prejudicial in stating that plaintiff's negligence must be *the* proximate cause, as distinguished from *a* proximate cause,

Oct. 1919]

Opinion Per BRIDGES, J.

in order to prevent recovery, in the light of other instructions properly defining proximate cause in connection with contributory negligence.

Appeals from a judgment of the superior court for Yakima county, Taylor, J., entered March 2, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Reversed as to appellant Yakima county; affirmed as to appellant transportation company.

A. C. Spencer, Richards & Fontaine, and John F. Reilly, for appellant Yakima Valley Transportation Company.

O. R. Schumann, J. Lenox Ward, and Dolph Barnett, for appellant Yakima County.

Snively & Bounds, for respondent.

BRIDGES, J.—Respondent brought suit against Yakima County and Yakima Valley Transportation Company to recover damages for personal injury. A county road, for convenience called Naches highway, ran from the town of Selah, past several factories and canneries, to the Northern Pacific Depot some distance away. It was extensively traveled, both by vehicles and pedestrians. Originally this road was much narrower than it now is. About 1909, the property owners, wishing to have the road widened, deeded strips of land to the county for that purpose. Shortly after the road was thus widened, the property owners and certain other citizens, at their own expense, built a wooden sidewalk along the southerly margin of the newly widened road. This sidewalk consisted of stringers with boards nailed cross-wise. It was approximately four feet in width. The county has never repaired or worked on this sidewalk, although it has had

knowledge that it was extensively traveled by pedestrians. The sidewalk mentioned was approximately two feet lower than the graveled roadway. In 1915, the transportation company obtained permission from the state public service commission to build its railroad across this highway at the grade of the graveled portion thereof. In order to do so, it was necessary to make a fill of about two feet in that portion of the highway south of the graveled portion and where the sidewalk was located. In making this crossing the transportation company's employees sawed off the sidewalk at the point of crossing and lifted the easterly section thereof, about fifteen feet in length, out of the way, leaving the same intact, and did likewise with the section on the westerly side of the track. It then made its fill of about two feet, laid its ties and rails thereon, and replaced the sections of the sidewalk just as they originally were, except originally they were level, but were now placed on the fill, thus giving some incline up to the railroad crossing. On the 23d of November, 1916, the respondent was walking on this sidewalk with a friend. When the friend stepped on one end of the fourth board east of the easterly rail, that board lifted and caused the respondent to trip and fall, whereby she was injured. After making the crossing, the transportation company had never maintained any portion of the sidewalk, but did plank between its rails and for about one foot on the outside of each rail.

The respondent undertook to prove that the transportation company actually owned the title to that portion of the roadway which covered the sidewalk crossing and the location of the offending board, whereas that company contends that its ownership reaches only to the boundary line of the roadway as widened. The deed which the transportation company received described the lands by metes and bounds, and, as so

Oct. 1919]

Opinion Per BRIDGES, J.

described, would carry the description into the road and would give title to the transportation company to that portion of the roadway covered by the crossing and the sidewalk here involved. But that deed further recites that the land conveyed "runs to the south line of the road now used and traveled as a public road." This south line of the road had a fence on it. It is a well established rule of law that description by monuments will control over description by metes and bounds, consequently we are of the opinion, and hold, that the transportation company's ownership went only to the south line of the road, and did not include the crossing involved in this suit.

Judgment was rendered in favor of the respondent against both the appellants. The appellants appeared separately in the trial court and have separately appealed. They have raised many questions, some of which are of considerable importance and difficulty. We will first discuss the questions raised by the appellant county.

I. The complaint alleged that, on the 24th day of March, 1917, the respondent caused to be served and filed with the county auditor of the appellant county, a notice of claim which the board of county commissioners had failed, neglected and refused to pass upon, although the board had had more than a reasonable time within which so to do. In support of her action, the respondent introduced such claim or notice in evidence. This notice is full and complete; it sets out the place, time, manner and extent of the injury, and the amount of her damages. It seems to be conceded that the notice is all that the statute required, except that it does not, upon its face, make demand of the county for payment. It was contended by the county that this claim or notice was insufficient for the reason

that it made no demand upon the county for payment or compensation. Section 3909, Rem. Code, after providing for appeals from the actions of the county commissioners, contains the following clause:

“Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same has been presented or disallowed, in whole or in part, by the board of county commissioners of the proper county; provided, that such action be brought within three months after such claim has been acted upon by such board.”

The trial court was right when it ruled that this claim was sufficient. While on its face it does not make any demand for payment, yet the only possible purpose the respondent could have had in making the claim was to make a demand against the county for reimbursement.

II. It seems to be assumed in the briefs, although there was no testimony that we can find on the subject, that the county commissioners never acted on this claim either by allowing it in whole or in part, or by rejecting it, and the appellant county now contends that this suit was prematurely brought, for the reason that the statute, above quoted from, contemplates that no action may be brought on such claim until the same “has been acted upon” by the board. In coming to the conclusion we have, we are mindful of the rule of law that a county may not be sued at all by a private individual except by permission of statute, and then only upon such terms and conditions as the legislative act may prescribe. Nearly all other similar statutes in this and other states contain a provision to the effect that suit shall not be commenced until the claim has been presented and a reasonable time for action thereon has elapsed. There appear to be very few authorities

Oct. 1919]

Opinion Per BRIDGES, J.

directly in point on this question. The briefs cite none such. We hold that, under this statute, after the county commissioners have failed to act within a reasonable time, it will be conclusively presumed, as a matter of law, that they have rejected the claim. The appellant contends that, if the commissioners have had a reasonable time within which to act, and have failed and refused to act, the claimant may bring mandamus to force the commissioners to take action. They cite a large number of cases showing that mandamus is the proper remedy in that instance. We have no doubt that respondent might have resorted to this remedy, but the law abhors a multiplicity of suits and the courts will always so construe the law as to avoid them if possible. It would seem absurd that the law should be such that the county commissioners might arbitrarily refuse to act on a claim, and thus hold the claimant out of her just rights or force her into expensive litigation to compel them to do that which the law has imposed upon them. If the commissioners have not acted upon this claim within a reasonable time, they ought to be estopped to deny that, by such neglect they have rejected the claim. The case of *Kraft v. City of Madison*, 98 Wis. 252, 73 N. W. 775, is almost directly in point. The statute there provided that no action should be maintained against the city until the claim on which it is based shall have been first presented to the council for allowance, and that the disallowance of the claim is final, except by an appeal to the circuit court. The plaintiff in that case had presented a claim which the council had failed, within a reasonable time, to act upon, and he brought suit directly on his claim. The court said:

“But there is no provision in the charter for the case of an entire omission of the common council to act upon the claim, . . . No doubt, the common

council is to be allowed a sufficient and reasonable time in which to make audit of the claim Until the expiration of such reasonable time, the city should not be subject to be harassed by an action. But, by omitting to act upon the claim within such reasonable time, it may fairly be deemed to waive the benefit of its exemption from an action instituted in the usual way. It cannot by inaction stand off the claimant indefinitely. . . . But it is urged that the claimant had a remedy, by way of mandamus, to compel the common council to act upon his claim, and that he was limited to that remedy. Doubtless, that remedy was open to him. But that affords a remedy only by a circuitous route. . . . The law favors directness, rather than circuitry, of action. The plaintiff was not limited to the remedy by mandamus. He had an election. It was within his election to bring his action in the usual way, directly against the city. *Sharp v. Mauston*, 92 Wis. 629."

This claim was filed with the county commissioners on the 6th day of April, 1917; this suit was brought nearly seven months thereafter, on the 19th day of November, 1917. It is perfectly plain that more than a reasonable time was allowed the commissioners within which to act upon the claim, and having failed to act, we hold that they have thereby rejected the claim and the respondent had a right to maintain her suit.

But counsel for the appellant assert that, if it be concluded that the failure of the commissioners to act within a reasonable time was tantamount to a rejection of the claim, then, since three months time after the rejection is given by the statute within which to bring such suit, it would be reasonable to conclude that three months would be a reasonable time within which to give the commissioners to act upon the claim. Consequently, they contend, that the claim must be considered as rejected within three months after it was

Oct. 1919]

Opinion Per BRIDGES, J.

filed, and, if so, then this suit was not brought within three months after the rejection. We do not attach much weight to this contention. In the first place, the claim would be considered as rejected as of the time the claimant elected to sue; and secondly, the county may not take advantage of its own wrong.

III. During the trial the county's codefendant, the transportation company, offered in evidence various photographs showing the dilapidated condition of this sidewalk at various points somewhat distant from the place of the actual injury. The special purpose of these photographs was to attempt to show that the sidewalk throughout its length was in a very dangerous condition and that the respondent was guilty of contributory negligence in walking thereon at all. The court received these photographs over the objection of both the county and the respondent. The county contends that, in no event, as against it, could such photographs be admitted in evidence, except to show, or as tending to show, notice on its part of the particular defect in question. The respondent does not answer this argument except to say that she did not offer these photographs in evidence and that she objected to them, and consequently, if there was any error in receiving them, that error cannot be attributed to her, and she cannot be made to pay the penalty. This, however, is not the rule. Each party to a lawsuit is entitled to a fair trial. The court itself represents each and all of the litigants, and each litigant must bear the burden of any errors which may be made by the court. If the court himself should ask and require of the witness an answer to a highly prejudicial question, certainly the party who was not injured thereby could not be heard to say that he ought not to be held responsible and be required to bear the burden of the court's error. Instructions which the court gives the jury are acts of

the court for which no party litigant is directly responsible, and yet any litigant injured by such instruction can complain thereof. In the case of *Palmer v. New York & L. C. Transp. Co.*, 27 N. Y. Supp. 561, the court said:

"But the respondent claims that the evidence in regard to the custom was offered by appellant's co-defendant, and not by him, and hence appellant's objection to the introduction of such evidence is not available against the plaintiff on this appeal. . . . The jury were not instructed that the objectionable evidence was not to be considered as against appellant, as in the case last cited [*Schneider v. Railroad Co.* (Super. N. Y.), 15 N. Y. Supp. 556] . . . Although the plaintiff did not introduce the evidence as to the custom, or request the charge above referred to, the effect of such evidence and charge being, in all probability, to influence the verdict, we think a new trial should be granted. The plaintiff's position is like that of a party where a trial judge asks of a witness an improper question, which is objected to, and the objection overruled, and an exception taken. If such exception is well taken, a new trial will be granted on account of the error of the court, although such error occurred without any fault on the part of such party."

In the case of *Zimmer v. Third Avenue R. Co.*, 55 N. Y. Supp. 308, where this question was involved, the court said:

"However, as to such requests as the court did charge, the source from which they proceeded was immaterial, and, if erroneous, the aggrieved party is entitled to reverse the judgment to the same extent as if the charge had not been made at the instance of its codefendant."

See, also, the case of *Pierce v. Michel*, 60 Mo. App. 187.

It is, therefore, necessary for us to determine whether or not these photographs were admissible as

Oct. 1919]

Opinion Per BRIDGES, J.

against the county. It appears that, under the almost universal rule, such photographs would, within the reasonable discretion of the court, be admissible for the purpose of showing notice on the part of the county of the particular defect which caused the injury. But such testimony is not admissible for any other purpose. 8 Ency. of Evidence, 911; *Olson v. Town of Luck*, 103 Wis. 33, 79 N. W. 29; *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311; *Laurie v. Ballard*, 25 Wash. 127, 64 Pac. 906; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

We heartily approve of what was said by the court in the case of *Olson v. Town of Luck*, *supra*, as follows:

"The plaintiff was allowed to prove, against objection, that the highway between the place of the accident and the place where the wagon was found (a distance of more than a mile) was full of rocks and holes. Of course, the fact that there were other serious defects in the road at other points, at a distance from the alleged defect which caused the accident, can have no legitimate bearing on the question as to whether the projecting stone in question was or was not an actionable defect, but it is manifest that such evidence would be almost certain to have great weight with the jury upon this very question. It is true that there are a number of cases in this court holding that, where a defect in a certain sidewalk, bridge or other similar structure is charged to have caused an injury, evidence of the general bad condition of the same sidewalk, bridge or structure may be shown, provided, the general disrepair proven is of the same general character as the defect in question. *Shaw v. Sun Prairie*, 74 Wis. 105; *Barrett v. Hammond*, 87 Wis. 654. In these cases, however, such testimony was not admitted for the purpose of proving negligence or that the defect in question existed, but only for the purpose of proving constructive notice to the corporation of the defect in question, which would be fairly inferable from the existence of many similar defects, resulting from the same general cause, in the same structure."

It must be remembered that these photographs were offered for the purpose of showing contributory negligence on the part of the respondent. It is probable they were admissible for that purpose, but in receiving them the court should have warned the jury that they could not be considered as tending to prove that the defect complained of existed. Without such warning, the jury would likely conclude that proof of defects away from the place of injury would be proof of the existence of the defect in question.

We conclude that the court committed error in the manner of receiving these photographs.

IV. During the trial the transportation company offered in evidence a letter written by the then deputy prosecuting attorney of the county to a resident thereof, concerning this sidewalk. This letter was received over the objection of the county and the respondent. It was written some fifteen months after the injury involved in this action occurred. It was as follows:

“Yakima County,

“Office of Prosecuting Attorney,

“North Yakima, Washington. Feb. 16, 1918.

“Mr. Ira S. King,

“Pres., Selah Business Men's Association,

“Selah, Washington.

“Dear Sir: Upon investigating the sidewalk running from the village of Selah to the Northern Pacific Railway Station, we notice that the same is in bad condition, some boards are loose, others are partially gone, still others have holes in which the foot of a pedestrian might be caught, causing them to fall and become seriously injured.

“The county is now defending a damage case which has been instituted because of alleged defect in the sidewalk.

“The county commissioners have instructed me to inform the business men of Selah, through you, that they desire to co-operate with them in every way for

Oct. 1919]

Opinion Per BRIDGES, J.

the convenience of the residents of Selah, but that owing to their liability in case of accident or injury to pedestrians, they deem it advisable to require said sidewalk to be entirely removed unless the same is put in a safe condition in the immediate future and so maintained.

Respectfully,

“(Signed) J. Lenox Ward,
“Deputy Prosecuting Attorney.”

We cannot understand upon what principle of law this letter was received in evidence. It certainly was very detrimental to the county. If the letter had been written at the time of the injury and as a part of the *res gestae*, then there might have been some reason for its introduction. In the case of *Weidman v. Tacoma R. & Motor Co.*, 7 Wash. 517, 35 Pac. 414, it was held that the declarations of an agent made sometime after an accident cannot bind the principal unless they were made as a part of the *res gestae*.

The case of *Randall v. Northwestern Telegraph Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17, was one for damages on account of personal injury. At the trial a telegram sent by the railroad superintendent was read in evidence. This telegram was as follows:

“Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you tomorrow and see them, but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident, but the repair-man neglected his duty, and we must pay the penalty. Answer.”

The telegram was sent on October 20, and the accident referred to occurred during the previous August. The court said:

“It is clear that this telegram was not a part of the *res gestae*, and its admission as original evidence against the defendant can only be sustained upon the

ground that the admission of the general agent or superintendent of the company bound the company. In the absence of any proof showing that the superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power."

This letter ought not to have been received for any purpose.

V. The county further contends that the statutes of the state of Washington do not authorize it to build sidewalks in its roads, and therefore it cannot be made liable for any negligence in failing to properly maintain them if any are built. The authorities cited by the appellant in support of this contention are not in point.

Section 951, Rem. Code, provides:

"An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

Section 3890, Rem. Code, authorizes the county commissioners to lay out, discontinue, and alter county roads and highways, and do all other acts relative thereto. Rem. Code, § 5575 *et seq.*, gives the county commissioners supervision and control of the county roads and bridges and authorizes the levy of taxes therefor. We have no doubt that a sidewalk in a county road is a part of the road authorized by law, and that it is the duty of the county to keep it in reasonably good repair. This exact question has, at least by inference, been decided by this court. In the case of *Clark v. Lincoln County*, 1 Wash. 518, 20 Pac. 576, the plaintiff sued the county for personal injuries caused by a defective sidewalk. This court held that the

Oct. 1919]

Opinion Per BRIDGES, J.

county was not by law authorized to build and maintain sidewalks, and was not, therefore, liable for an injury resulting from a defect therein. However, in the case of *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, the doctrine of the *Clark* case was repudiated. See, also, *Orrock v. South Moran Township*, 97 Wash. 144, 165 Pac. 1096.

We will now consider the errors contended for by the appellant transportation company.

VI. This appellant contends that the complaint alleged that it was the owner of the property where this crossing of the sidewalk was made, but the court erroneously submitted the case to the jury on the theory that the transportation company merely had a statutory right to cross. It is contended that this was a fatal variance; that, if the appellant transportation company actually owned the title to this land, one set of laws would be applicable to its duties, but if it had nothing more than a right of way given by the statute, entirely different duties would devolve upon it. It is true the respondent did undertake to prove that this appellant was the owner of the title to the land covered by this sidewalk and crossing, and that it failed in its proof, but we think the allegations in the complaint were broad enough to allow the court to submit the case to the jury upon the theory that the appellant had nothing more than a statutory right of way. The complaint alleges that the transportation company "owned, controlled and maintained a right of way across said Naches Avenue." The right of way there pleaded may be construed to mean the right of way given by the statute, or the statutory privilege of crossing the county road. In any event, the appellant did not claim surprise nor ask a continuance on this account, and we do not see that there was such a vari-

ance from the complaint as that the appellant was prejudiced.

VII. The trial court was of the opinion that the duties devolving upon the transportation company to construct and maintain the crossing in question were imposed by § 8730 *et seq.* of Rem. Code. Appellant contends that that section of the code had reference only to stock crossings and is inapplicable to the question involved in this case. With this contention we agree. That section was a part of the Laws of 1907, and provided that every company building or operating a railroad shall cause to be constructed and maintained in good repair a substantial fence along its right of way, and wherever the railroad shall cross a public highway, a safe and sufficient crossing must be built and maintained, and on each side of the crossing there must be cattle guards, and that the railroad company shall be liable on account of stock killed or injured if it fail to comply with the statute. The title of the act is as follows:

“An act compelling railroads to fence their rights-of-way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains.” Laws 1907, p. 169.

It is very plain to us that this statute was passed solely for the protection of stock and is wholly inapplicable to this case. However, a later act of the same session (Laws 1907, p. 192) gives authority for railroads to cross highways. It provides, among other things, as follows:

“In case any such railroad or railway, is or shall be located in part on private right-of-way, the owner thereof shall have the right to construct and operate the same across any county road or county street which intersects such private right-of-way, if such crossing

Oct. 1919]

Opinion Per BRIDGES, J.

is so constructed and maintained as to do no unnecessary damage: Provided, That any person or corporation constructing such crossing or operating such railroad or railway on or along such county road or public street shall be liable to the county for all necessary expense incurred in restoring such county road or public street to a suitable condition for travel." Rem. Code, § 9080.

Appellant contends that this statute is controlling and that it does nothing more than announce the principles of the common law. We are of the opinion that this last statute does not pretend to set out the duties of a railroad company with reference to the construction or maintenance of crossings, but only authorizes a railroad to cross a highway. This statute does not affect the duty imposed by the common law to keep the crossing in reasonable repair. The appellant, having built its road across this highway, its duty to the public and to the respondent, in this case, must be measured by the rules of common law. It becomes necessary for us to determine what were such duties under the common law.

Counsel for appellant has presented a forceful brief and argument to the effect that, at the common law, when one way was laid over an existing way, the junior way was required to do no unnecessary damage in making the crossing, and if new structures are necessary to the crossing of the old way by the new, the new way must construct and maintain those new structures. The authorities cited by counsel support this contention as to what the common law is on this question. From this statement of the common law, the appellant draws the conclusion that the only duty devolving upon it was to replace the sidewalk in as good condition as it was before it crossed the same, and that it had no duty to maintain it. We think, however, appellant misconstrues and misinterprets the duties imposed upon

it by the common law. It must be remembered that, in constructing its road across the highway, it found the sidewalk in question to be about two feet beneath what would be the grade upon which its road would be built. It therefore made a fill of about two feet where the sidewalk was. The sidewalk was then placed back on top of this fill; the plank upon which the respondent tripped was twenty-six inches from the easterly rail. The overlap of an engine or car passing the sidewalk would be about twenty-three inches from the rail. In other words, the overlap of the train would not reach the plank on which the respondent was injured. However, the defective plank was upon that portion of the sidewalk which lay upon the fill made by the appellant. The exact question to be determined is whether or not it was the duty of this appellant to maintain that portion of the sidewalk upon which the respondent was injured.

It is our opinion that the common law imposes the duty upon a railroad crossing a highway by virtue of a statutory permission, to maintain that portion of the highway used or occupied by it, and since, in this case, the fill where the sidewalk was located was necessary for the uses of appellant, and since the appellant occupied all that portion of the highway actually covered by its fill, and since that portion of the sidewalk upon which the respondent was injured was laid on a portion of this fill, we hold that it was the duty of the transportation company to maintain that portion of the sidewalk.

The case of *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767, was a personal injury case at a railroad crossing. The court there said:

“I am not aware of any statute in this state which expressly provides that railroad companies shall construct and maintain in good order street crossings at

Oct. 1919]

Opinion Per BRIDGES, J.

the grade intersections of their railroad and side tracks with the streets of the cities of this state; but railroad companies are by the statutes given the right to lay their tracks in and across the streets of the municipalities of the state, and this right carries with it the corresponding duty on the part of the railroad companies to construct and maintain at all times proper crossings on the streets intersected at grade by their tracks and side tracks; and if any injury is caused by reason of their neglect to do either, they are liable therefor."

At page 273, vol. 33 Cyc., it is said:

"It is not sufficient for a railroad company properly to construct a crossing and to restore the highway crossed to a proper condition; but it is the duty of the company subsequently to keep and maintain the crossing in a safe and suitable state of repair, including not only the crossing of the tracks but also the approaches thereto. This is a common law duty, but is frequently expressly imposed by statutory or charter provisions."

In the case of *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, it was said:

"By the common law, if a railroad or canal company cross or build its work upon a public highway, it must make and maintain a proper, convenient, and safe crossing, and restore the highway to as good condition for public use as the condition in which it was before such interference with it, though such company be acting under leave from the proper authority."

Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 South. 158, 11 Am. St. 395, states the rule thus:

"Where the statute is silent, the common law applies, and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common law duty of maintaining the crossing in such plight as to make it reasonably safe."

In *People ex rel. Bloomington v. Chicago & A. R. Co.*, 67 Ill. 118, the court says:

"It is a well settled principle of the common law, resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such person or corporation, must furnish to the public a proper crossing, even though acting under a license from the proper authorities. We refer, of course, to cases where the legislative power has not, in terms, relieved the person or company that interferes with a highway, from the necessity of removing any obstructions they may create. In the absence of such an express provision, it is palpable that a railway company is under obligation to leave every highway that it crosses in a safe condition for the public. . . . An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchise."

At § 1112, vol. 3, Elliott on Railroads (2d ed.), it is said:

"The duty of a railroad company in regard to the restoration and repair of highway crossings is not fully performed and ended by the mere restoration of the highway or the construction of a proper crossing in the first instance. It should keep the crossing in reasonably safe condition and repair, with reference both to the use of the same for its own purposes and for ordinary travel upon the highway."

To the same effect see the following cases: *Maltby v. Chicago & W. M. R. Co.*, 52 Mich. 108, 17 N. W. 717; *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 518; *State ex rel. City of Minneapolis v. St. Paul M. & M. R. Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. 581, 28 L. R. A. (N. S.) 298; *Paducah R. R. Co. v. Commonwealth*, 10 Am. & Eng. R. R. 318; *Cleveland*

Oct. 1919]

Opinion Per BRIDGES, J.

v. City Council of Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638; *Farley v. C. R. I. & P. Co.*, 42 Iowa 234; 2 Elliott, Roads and Streets, § 1010; *Birlew v. St. Louis & S. F. R. Co.*, 104 Mo. App. 561, 79 S. W. 490; *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 87 Tenn. 712, 11 S. W. 943.

We have no hesitancy in laying down the rule that, where a railroad crosses a highway (in the absence of statutory regulation), it is the duty of the railroad company to maintain that portion of the highway which it actually occupies and uses, including such approaches to the railroad tracks as are necessary in order to make a reasonably safe crossing. If the crossing is on the exact grade of the highway, the approach would be only that portion of the highway very near to the track, where it would be necessary to board or otherwise improve so as to make a reasonably safe way over the rail; but if the railroad cross the highway either above or below grade, then the approach would be of such proper length as would furnish a reasonable grade to the crossing and be of such width as to furnish a reasonably safe crossing. The width of the approach would depend upon how much of the highway right of way is improved and traveled.

Counsel for appellant seems to admit that it is the duty of the railroad to maintain that portion of the crossing which is between the rails. We know of no rule of law or reason which would require the railroad company to maintain that portion of the highway which is between the rails and would relieve it of the duty to maintain that portion of the highway upon which it has its fill. If, in this instance, the railroad company had put its railroad on blocks where it crossed the sidewalk, and had elevated the sidewalk on blocks to make a proper crossing of the track, it would seem clearly to be the duty of the transportation

company to maintain that portion of the sidewalk which it had so elevated. It would seem that there could be no difference in principle whether the sidewalk is propped up or whether it is laid on a fill made by the transportation company.

We think the court was justified in submitting the question of negligence to the jury, in so far as the transportation company was concerned. The conclusion to which we have come makes it unnecessary to discuss some of the instructions complained of with reference to approaches.

VIII. The court submitted to the jury certain interrogatories to be answered by them. We do not think it is necessary to set out here these interrogatories, or to say more than that we are of the opinion that they were unobjectionable. In this connection, the court instructed the jury that any ten of their number might answer any one of these interrogatories, and the appellant complains of this portion of the instructions. The matter, however, seems to be controlled by our statute. Section 358, Rem. Code, provides as follows:

"In all trials by juries of twelve in the superior court, except criminal trials, when ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict shall stand as the verdict of the whole jury, and have all the force and effect of a verdict agreed to by twelve jurors."

Section 364, Rem. Code, is as follows:

"In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding

Oct. 1919]

Opinion Per BRIDGES, J.

thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes."

It would appear, therefore, that these interrogatories were special verdicts under the statute, and since the statute authorizes ten jurors to return a verdict in certain actions, it would seem that the court's instruction authorizing any ten of the jurors to answer the questions was in accordance with the statute.

IX. In instruction No. 34 the court undertook to define to the jury proximate cause, and in so doing used the following expressions:

"In event you believe that one or the other or both of the defendants were negligent and that the plaintiff was also negligent, you must ascertain which negligence was the proximate cause of the injury as distinguished from the remote cause, and base your verdict accordingly. Any one or all of the parties may have been negligent; if the negligence of the plaintiff was the proximate cause of the injury, the plaintiff cannot recover; but if her negligence, if any, was not the proximate cause, but the remote cause, and the negligence of one or both of the defendants was the proximate cause, then the plaintiff would be entitled to recover."

The appellant transportation company objects to this instruction because the court told the jury that the respondent's negligence must be *the* proximate cause as distinguished from *a* proximate cause, in order to prohibit her recovery. The distinction made by the appellant is correct as a principle of law; but in this instruction the court was manifestly instructing the jury as to the difference between proximate and remote cause, and when read in that light the instruction is not improper. Instruction No. 30 covered the question of contributory negligence, and set forth that contributory negligence arises from the failure on the part of the person injured to exercise

reasonable care, and if the failure to exercise such reasonable care "proximately contributes to the cause of the injury," then there can be no recovery. This instruction properly defines proximate cause in connection with contributory negligence.

One or two other minor questions raised by the transportation company's briefs have been duly considered, but we do not find any merit in them.

The case is reversed and remanded for new trial as to the appellant county, and the judgment is affirmed as to the appellant transportation company.

HOLCOMB, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

ON REHEARING.

[*En Banc*. February 17, 1920.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the case is reversed and remanded for new trial as to the appellant county, and the judgment is affirmed as to the appellant transportation company.

Oct. 1919]

Opinion Per FULLERTON, J.

[No. 15319. Department Two. October 10, 1919.]

CHARLES F. GOODRICH, *et al.*, Respondents, v. GEORGE
E. STARRETT *et al.*, Appellants.¹

NUISANCE (2) — WHAT CONSTITUTES PRIVATE NUISANCE — UNDERTAKING ESTABLISHMENT—INJUNCTION. Under Rem. Code, §§ 943, 8309, defining nuisance, and adding to the common law definition a new element—"the comfortable enjoyment of one's property"—an undertaking establishment and morgue, conducted in an old dwelling out of repair in the residential section of the city in such a manner as to affect the peace of mind and destroy the property values of the neighborhood will be enjoined as a nuisance.

Appeal from a judgment of the superior court for Jefferson county, Ralston, J., entered September 29, 1917, upon findings in favor of the plaintiffs, in an action for an injunction, tried to the court. Affirmed.

A. R. Coleman, for appellants.

Allan Trumbull, for respondents.

FULLERTON, J.—This is an action to enjoin the maintenance of an undertaking establishment and morgue, alleged in the complaint to constitute a nuisance. The trial court entered a permanent injunction, and defendants appeal.

The facts appearing in the record are in substance these: The appellant Starrett is the owner of a building originally constructed as a dwelling-house, situated in a residence portion of the city of Port Townsend, which is surrounded by the dwelling-houses of others in use as residences by their owners. For some twenty years prior to the commencement of the action, Starrett, either by himself or in partnership with others, had conducted an undertaking establishment and morgue in the city of Port Townsend, at a place

¹Reported in 184 Pac. 220.

remote from residences, and to which there was seemingly no objection because of its location. Some three years prior to the commencement of the action, Starrett entered into partnership with his coappellant, Weeks, for the conduct of the business, and shortly prior to the commencement of the action, moved the business to the dwelling house of Starrett before mentioned. At the time of the removal, the house was somewhat out of repair, one of the windows was entirely gone and others had in them broken panes of glass, all were without fly screens, or screen of any sort save for some sash curtains of a flimsy nature, and there were no proper sewer connections necessary, as one of the appellants admitted, to the conduct of a first-class morgue. With the house in this condition, the appellants began to receive dead bodies for the purpose of preparing them for burial, those dying from contagious and infectious diseases as well as others. Their testimony was, however, to the effect that the building was being put in repair as rapidly as possible.

The respondents severally own dwelling-houses which are adjacent to and surround the house in which the appellants are conducting their business. The testimony of the respondents was to the effect that the conduct of the business greatly interfered with the enjoyment of their homes; that they lived in dread of acquiring some contagious disease; that the constant conveying of dead bodies in and out of the building, the conducting of funeral services therein, accompanied, as they are, by the hysterical sobbing of the relatives of the dead, has a depressing effect upon them, especially the womenfolk of the families, who, because of the nature of their duties, must remain in the homes and be constant witnesses of the business conducted by the appellants. As typical of the testimony concerning the effect the conduct of the business

Oct. 1919]

Opinion Per FULLERTON, J.

had upon the surrounding families, we quote from the testimony of the respondent Mrs. Goodrich:

"I am unable to relish my meals or sleep properly; it is on my mind continually. It has a depressing effect upon me. I don't think I am over sensitive. I have been with the dead at the time of dying, and have no fear of spirits or anything like that, but it is very disagreeable. I have a constant fear of contagion from living in close proximity to a morgue, on account of my children and family. I have noticed a great many flies around my premises lately. I am continually fighting them in the house; we are in fear of them all the time. It suggests this morgue the moment I see a fly. I can see in the morgue. I can see from my back door the entrance there, I presume, to the basement of the cellar of the house, and upstairs I can see what goes on in the street, I can hear hysterical sobbing and the music that is played there. From my yard I can see them carrying in and out dead bodies. It spoils the enjoyment of our home. I don't care to invite guests to dine at my table; I know that a great many of my friends have the same feeling that I have in regard to it. My chief pleasure has been in caring for my garden, and I am denied that pleasure. If the morgue continues to run in close proximity to my residence, I feel that I cannot live there, and will want to move as soon as we are able."

There was testimony also that the permanent operation of the business will greatly decrease the money value of the surrounding property, and testimony of a physician, called as an expert, to the effect that contagious diseases could be carried from the dead bodies in the morgue to the inhabitants of the surrounding dwellings, although it can be gathered from his evidence that he thought the probability somewhat remote.

The testimony of the respondents as to the danger to them arising from the presence of the undertaking establishment was denied by the appellants, and their

testimony tended also to minimize the injury testified by the respondents to arise from the general conduct of the business.

It is the appellants' contention that the facts do not justify the judgment of the court. Attention is called to the general rule that the business of an undertaker is not a nuisance *per se*, and to the corollary of the rule that before it can be held to be such, some special circumstances must be shown taking the particular business from without the rule, and argue that the evidence here fails to disclose any such special circumstance.

The code, under the chapter entitled "Nuisances," defines a nuisance as follows:

"Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property." Rem. Code, § 8309.

In the chapter of the code prescribing a remedy for the abatement of nuisances, a nuisance is further defined as:

" . . . whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property, . . ." Rem. Code, § 943.

In *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912B 1128, 31 L. R. A. (N. S.) 827, we said that these statutes somewhat widened the common law definition of nuisance, in that a new element was added, "that is, the comfortable enjoyment of one's

Oct. 1919]

Opinion Per FULLERTON, J.

property"; and it was there held that dread of disease and fear produced thereby, contrary to the holding of a case founded upon the common law, warranted injunctive relief against a sanitarium for the care of patients afflicted with tuberculosis, which it was sought to establish in a residence district of the city. And this notwithstanding the expert testimony which tended to show that the danger of contagion to the surrounding residents was remote and the fear more imaginary than real.

In *Densmore v. Evergreen Camp No. 147*, W. O. W., 61 Wash. 230, 112 Pac. 255, Ann. Cas. 1912B 1206, 31 L. R. A. (N. S.) 608, the principle was applied to an undertaking establishment. It was there held that such an establishment could be enjoined as a nuisance when it was sought to conduct it in a residence district, notwithstanding it was maintained with every sanitary precaution.

The principle of these cases clearly justifies the judgment of the trial court. The witness from which we have quoted but voiced the feeling and sentiment of the ordinary individual who is compelled to live near an institution of this sort. The injury to her is physical and actual; it does not depend upon imagination. There are persons, of course, whose occupations have brought them to endure conditions of this sort without suffering or discomfort. But this is the result of their environment. The ordinary individual cannot endure them without actual discomfort and physical suffering, until, at least, his senses have become hardened by a long period of exposure to them. In addition to this, there is the positive showing of destruction of property values. While counsel question the sufficiency of the evidence in this respect, we think the only thing indefinite about it is the amount of the decrease. That there is a substantial decrease, we think

was abundantly proven. Indeed, it would seem that it is within the ordinary knowledge of mankind that the erection of an undertaking establishment and morgue in a district of a city suitable only for and used only for residence purposes would decrease the value of the surrounding property. Certainly no one possessing the sensibilities of the ordinary being would take up a residence in its vicinity as long as other places were obtainable.

But perhaps the appellants' principal reliance for reversal is the case of *Rea v. Tacoma Mausoleum Association*, 103 Wash. 429, 174 Pac. 961. In that case we held that an addition to a mausoleum would not be restrained as a nuisance, injuriously affecting adjoining residence property, when unattended by injurious or offensive drainage or fumes sensible to the complaining party. In the case, however, the cases of *Everett v. Paschall* and *Densmore v. Evergreen Camp No. 147, W. O. W.*, were noticed and held not to be in conflict with the principle there announced. We are still of the same opinion, and hold that the case in no way reflects upon the earlier cases as authority.

We think it needless to pursue the inquiry further. Our conclusion is that the judgment appealed from should stand affirmed. It is so ordered.

HOLCOMB, C. J., MOUNT, and BRIDGES, JJ., concur.

Oct. 1919]

Statement of Case.

[No. 15383. Department Two. October 10, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Frank
A. Ratliffe et al., Plaintiff*, v. THE SUPERIOR COURT
FOR WHITMAN COUNTY, *R. L. McCroskey,
Judge, Defendant.*¹

JOINT ADVENTURES—PARTNERSHIP (1, 2)—COMMUNITY OF INTEREST—SHARING PROFITS AS RENT. A partnership or joint adventure is not constituted by an agreement called a farm lease, with the usual provisions as to subletting, reentry, control and farming, which gave the lessor one-third of the crop for rent and one-third for use of equipment and its upkeep to be furnished by the lessor, the lessee to pay the cost of operation, and the balance of the crops, with increase of the stock, to be divided equally, where it contained no agreement that the lessor should share in the losses; but the same will be construed to be a lease creating the simple relation of landlord and tenant only.

LANDLORD AND TENANT (17)—TRANSFER OF REVERSION—RIGHTS AND LIABILITIES OF GRANTEES AND TENANTS—CONSTRUCTION OF LEASE. Under a farm lease of two farms, whereby, for a share of the crops and increase in the stock, the tenants were to operate the farms with equipment furnished by the landlord, upon a sale of the upper farm subject to the lease, the vendee thereof and the tenants could cancel the lease as to such farm and surrender possession to such vendee; and subsequent purchasers of the other farm and all the equipment, subject to the lease, had no right to oust the other vendee in virtue of any right they might have to compel the tenants to perform the contract by using the equipment on the farm first sold; their remedy, if any, being against the tenants for breach of contract.

Certiorari to review a judgment of the superior court for Whitman county, McCroskey, J., entered April 1, 1919, upon findings in favor of the plaintiffs, in an action to recover possession of real property. Affirmed.

Burcham & Blair and *Glenn E. Cunningham*, for relators.

Samuel P. Weaver, for defendant.

¹Reported in 184 Pac. 348.

BRIDGES, J.—This is an action for the possession of real estate. We will refer to the parties as plaintiffs and defendants. The facts are substantially as follows:

On November 29, 1916, one George Strachan was the owner of two farms located in Whitman county, Washington; one has been and will be referred to as the upper, and the other as the lower farm. Strachan was also the owner of various farm machinery, tools, implements and appliances, and also several head of work horses. On the date above mentioned, Strachan, as the party of the first part, and J. E. Neece and W. E. Neece, as the parties of the second part, entered into a written instrument, which was termed a farm lease, whereby both farms were leased by the first party to the second parties for three years. This instrument also turned over to the tenants all the above-mentioned farming equipment, horses, harness, etc. It was provided that the lessees should do all work in a first-class manner and should sow grain to such parts of the land as should be fit for grain, and all hay land was to be sown to hay. The lease then continues:

“First party is to receive and be entitled to the following proportions of the products raised on the above described lands, to-wit: Wheat, one-third; oats, one-third; hay, one-third. All grain which belongs to the first party is to be delivered by the second party at the nearest warehouse in sacks to be furnished by the first party. All hay and grain belonging to the first party is to be well housed and sacked so as to shed rain, until delivered at warehouse.

“Second party agrees to give first party at least ten days written notice of the time and place of threshing all grain grown on said lands, and not to assign this lease or sublet said premises without the written consent of the said party of the first part, and at the expiration of this lease to surrender up peaceable pos-

Oct. 1919]

Opinion Per BRIDGES, J.

session of said premises in good condition to the party of the first part.

"The title to all of the products shall be and remain in the first party until such time as he shall have received his full proportion thereof, and second party shall not mortgage or dispose of any part thereof to the prejudice of the party of the first part.

"The first party has the right to go upon the said premises at any time and perform such work thereon as he may deem advisable which does not prevent the party of the second part from carrying out the terms and conditions of this lease. Second party is to keep all buildings and fences in good repair. All damages caused by second party not complying with the terms of this lease shall be at a loss of second party.

"It is further agreed that no lien shall be claimed or filed by any party performing any labor or work of any kind whatever on said premises or on or about said products, and that no lien or right of lien shall exist therefor.

"Party of the first part agrees to furnish 24 head of work horses and harness for same, and all implements of every kind necessary to farm the said land and harvest the crops thereon, and to pay for all new extra parts needed to keep said machinery in good repair.

"Party of the first part agrees to furnish all seeds and feed necessary to till and sow said lands in the fall of 1916, and spring of 1917, one-half of whatever seed and feed is used in 1916 and 1917 to be returned to the first party at the termination of this lease by the party of the second part.

"Party of the first part and parties of the second part further agree that all grain and crops grown of the said lands after the rent of one-third has been paid shall be divided equally between the parties hereto, each party to furnish his own sacks to sack the grain, and the party of the second part is to do all the hauling of the grain and crops, and party of the first part agrees to pay wages for the men while they are hauling his share of the crops mentioned herein.

"It is further agreed by and between the parties hereto that all increase from the stock furnished by the party of the first part shall be divided equally between the parties hereto. Party of the first part agrees to furnish a stallion for work and breeding purposes.

"It is further agreed that all increase from the cattle furnished by the party of the first part shall be equally divided by the parties hereto."

The lease further provides how the increase of the stock shall be divided and that the lessees shall take proper care of all such stock; that, at the time of the making of the lease, there were about 350 acres of summer-fallow; that, at the termination of the lease, an equal number of acres of summer-fallow should be left on the lands; that all straw and pasturage on the place, at termination of the lease, should become the property of the lessor; that it was understood that the lands were being offered for sale and might be sold subject to the lease; and that, if the lessees failed to strictly comply with the terms of the lease, the same might be terminated by the lessor for that reason.

The contract seems to provide that Strachan is to receive one-third of the crops for the use of the lands and is to receive another one-third of the crops for the use of his teams and farming equipment, which is, of course, the same thing as receiving two-thirds of the crops for the use of the lands, horses, farming equipment, etc.

These farms were operated under this lease until July 17, 1917, when the lessor conveyed the upper farm to the plaintiffs, subject, however, to the terms of the lease. After the plaintiffs became the owners of the upper farm, they stepped into the shoes of the original landlord, in so far as that farm was concerned, and the Neece brothers continued to operate both farms under the terms of the lease, employing

Oct. 1919]

Opinion Per BRIDGES, J.

the machinery and farming equipment mentioned in the original lease for that purpose. The one-third of the crops was delivered to the plaintiffs instead of to Strachan, the original lessor. On May 11, 1918, Strachan conveyed the remainder of the land, to wit, the lower farm, together with all of the above-mentioned farming machinery, horses, cattle, etc., to the defendants' vendor. At about the same time, Strachan assigned to defendants' vendor all his interest in the lease. The Neece brothers, the tenants, continued to operate under the terms of their lease until on or about the first day of October, 1918, when they and the plaintiffs entered into an agreement whereby the original lease, in so far as the upper place was concerned, was canceled and annulled and possession of that place was turned over to the plaintiffs. They entered into actual possession about the first of October, 1918, but in a few days plaintiffs were ousted by defendants, who proceeded to plow, cultivate, seed and otherwise operate both the upper and lower farms. On October 12, 1918, Neece brothers informed the defendants that they would not further operate either of the farms and would surrender the possession of the lower farm, and all the machinery and farm equipment covered by the original lease, to them. After some controversy concerning the surrender, and some effort on the part of the defendants to persuade Neece brothers to continue the operations, they met and divided the stock as provided in the lease, and all machinery, tools, implements and appliances covered by the original lease and the lower farm were given into the possession of the defendants. At that time the defendants requested Neece brothers to assign to them all of their interest in the Strachan lease, which request Neece brothers agreed to comply with, but thereafter failed or refused so to do. Immediately

after the defendants had dispossessed the plaintiffs of the upper farm, the latter gave the usual notice to the former demanding possession. This defendants refused, and this suit followed. The case was tried to the court without a jury. The testimony took a very wide range. The trial court found for the plaintiffs and entered judgment accordingly. The defendants sued out a writ of certiorari for review by this court of the proceedings in the trial court, and the record is now before us.

It must at all times be kept in mind that the only question involved in this action is the possession and right to possession of the upper farm.

It is contended by defendants, as we understand them, that the instrument called a farm lease is of a dual character, being a combined lease and joint adventure; that, so far as it undertakes to lease the land itself, it creates the relationship of landlord and tenant, but in so far as it affects the farm equipment and the use thereof, it creates a joint adventure; that the joint adventure feature of the instrument could not be terminated by agreement between Neece brothers, the tenants, and the plaintiffs; at any rate, it could not be terminated so as to affect any rights which the defendants might have by virtue of the joint adventure relationship; that defendants had the right to have their equipment used on the plaintiffs' land and thus made to earn one-third of the crops; and that, when Neece brothers refused to so use the equipment, the defendants had the right to use the same on plaintiffs' farm, and consequently they had the right to the possession of that land in order to make such use of their equipment. The plaintiffs contend that the contract was a simple lease creating only the relation of landlord and tenant.

We agree with the finding of the trial court to the effect that plaintiffs were in the actual possession of their farm on the first day of October, 1918, and remained in possession until about October 12, 1918, when they were dispossessed by the defendants.

The courts and authorities have not yet laid down any very certain definition of a joint adventure, nor have they established any very fixed or certain boundaries thereof, but generally they have been content to determine whether the given or conceded facts in a particular case constitute the relationship of joint adventurers or copartners. Generally speaking, the authorities seem to hold that a joint adventure very closely resembles a copartnership, and that the rules of law governing the latter are generally applicable to the former. It is conceded that a joint adventure creates a close and even fiduciary relationship between the parties, and that whether an instrument establishes the relationship of landlord and tenant or joint adventurers or copartners is to be ascertained from the contract. 15 R. C. L., page 500 *et seq.*; 23 Cyc. 453 *et seq.*; *Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792, Ann. Cas. 1916E 440, and notes; *Brotherton v. Gilchrist*, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397, and note.

A careful study of the written instrument involved in this case convinces us that it is nothing more nor less than a simple lease creating only the relationship of landlord and tenant, and that it lacks many of the essentials of a copartnership or joint adventure. Almost everything in the instrument shows that it was the intention of the parties to execute a lease, and that only. By the instrument, Strachan leased to Neece brothers two certain farms owned by him, for the use of which lands he was to receive one-third of the crops.

Strachan also leased or hired to Neece brothers a complete farming equipment, such as horses, harness, plows, harrows, etc., for the use of which he was to be paid an additional one-third of the crops to be raised. The tenants were to do all of the work and be at all of the expense of operating the farm. They had no authority to hire farm help and charge any portion of the expense to the lessor, nor did the lessor have any authority to create any indebtedness concerning the operation of the farm. Strachan was to be at the expense for the upkeep and repair of all the farming equipment. He was to furnish certain seed, but it was to be returned to him in kind. The tenants were expressly prohibited from assigning the lease or subletting it, and were to surrender the premises in good condition at the termination of the lease. They were expressly prohibited from encumbering the crops or disposing of the same. The lessor reserved the right to go upon the land and use it in any way which was not inconsistent with the uses to which the tenants desired to put the same under their lease. The tenants were expressly forbidden to permit any liens for work or otherwise, and, finally, it was agreed that the lessor might terminate the lease should the tenants fail to faithfully live up to its terms. There was nothing in the agreement whereby the losses, if any, were to be shared. These provisions of the lease are, in our judgment, wholly inconsistent with the idea of a co-partnership or joint adventure. These questions are very intelligently discussed in the case of *Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265, where the court, speaking through Chief Justice Dunbar, said:

“It seems to us that this agreement cannot be construed to be a formation of a partnership in any sense. It purports to be a lease. It is recited in the instrument itself that it is a lease, and while, of course such

Oct. 1919]

Opinion Per BRIDGES, J.

recitation would not make it a lease if the elements of partnership were in the agreement, yet it seems to us that these elements are entirely wanting. Leases which provide for a division of the profits are of common occurrence in the business world. . . .

"It is true that there is an agreement here to share the profits, but on the other hand there is no agreement to share the losses, which is the ordinary test of a partnership. We know of no reason why a person who has a house, or a farm, or any other character of property which he is desirous of leasing, shall not be allowed to make his own terms as to what the payment shall consist of, whether, in the case of a farm, it shall be for one-half of the gross amount of grain raised, or for one-half of the amount of grain raised after the expense of putting in and harvesting the crop are deducted, or for a certain number of bushels of grain without regard to the amount raised, or for a certain specified sum of money. In each instance the amount agreed upon is intended as a payment for the use of the premises; and in the case at bar it seems that nothing more is imported into this contract than is generally found in contracts of lease."

In the case of *Parker v. Fergus*, 43 Ill. 437, the court, in construing a contract similar to the one involved here, said:

"Over this entire country, we see that farmers lease their lands for agricultural purposes, and agree to receive a third or other portion of the products of the soil, and the labor of the tenant, as a payment of the rent. Again, it not unfrequently occurs, that the owner of the soil furnishes the land, the teams, implements and the seed; while another performs the labor, and they divide the product, according to the terms of their agreement, and no one ever imagined, that in either class of such cases, the parties became in any sense copartners."

In the case of *Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 708, Ann. Cas. 1916E 440, 49 L. R. A. 792, the court, in construing a similar contract, said:

"There are obvious reasons for holding that farm contracts, or agricultural agreements, by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, are usually very informal in their character, often resting in parol as in the present case. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the inconveniences and dangers frequently incident to that relation."

To the same effect, see the following cases: *Cedarberg v. Guernsey*, 12 S. D. 77, 80 N. W. 159; *Musser v. Brink*, 68 Mo. 242; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Alwood v. Ruckman*, 21 Ill. 200; *Bowers v. Graves & Vinton Co.*, 8 S. D. 385, 66 N. W. 931; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Reeves v. Hannan*, 65 N. J. L. 249, 48 Atl. 1018; *Quackenbush v. Sawyer*, 54 Cal. 439; *Warner v. Abbey*, 112 Mass. 355; *Chapman v. Eames*, 67 Me. 452.

The cases relied upon by the defendants to show that this contract created, at least in part, a joint adventure are, in our judgment, very different in their facts from the case at bar.

The case of *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738, cited by defendants, was an instance where the plaintiff advanced to the defendant \$250 to be invested for their joint interest in options on certain real estate. If the venture was a failure the defendant was to return one-half of the money advanced, otherwise the profits were to be divided between the parties. Under these facts it would appear to be unquestioned that

Oct. 1919]

Opinion Per BRIDGES, J.

a partnership or joint enterprise relationship was created.

The case of *Baker v. Kever*, 130 Ga. 257, 60 S. E. 551, cited by defendants, did not determine whether the contract there being inquired into created a partnership, joint adventure or other character of relation.

In the case of *Bedolla v. Williams*, 15 Cal. App. 738, 115 Pac. 747, cited by defendants, the court expressly found it unnecessary to determine whether the agreement constituted a partnership or a joint adventure.

In the case of *Zech v. Bell*, 94 Wash. 344, 162 Pac. 363, the facts were that it was agreed between the parties that the appellant should obtain a contract to do certain work and he would pay certain of the bills, and the respondent should do the work, and that the profits should be divided. The court held that the agreement created a joint adventure.

In the case of *Bane v. Dow*, 80 Wash. 631, 142 Pac. 23, the respondents, who were brokers living in New York City, controlled certain importing business. They entered into a contract with appellants by the terms of which they directed this business to be turned over to appellants, and, after certain deductions, there was to be an equal division of the returns. The court held that the agreement constituted a joint adventure.

The facts in each of these cases are vastly different from the facts in the case at bar; in truth, the distinctions, to our mind, are so plain and palpable that they serve well to show the difference between an ordinary lease contract and a joint adventure.

It should be kept in mind that only Neece brothers were the tenants, and that they only had the right of possession. They did not assign to defendants their lease, nor right to possession by virtue thereof. Defendants were never the lessees nor assignees of the lease, and therefore could never have been entitled to

possession against the objections of the plaintiffs. Nor, for that matter, could they have become the lawful assignees of the lease, because that instrument expressly provided against any assignment. The right to have Neece brothers use their equipment on plaintiffs' lands did not give defendants themselves any right to possession of those lands. They were in the same position Strachan was after he had sold the upper place to plaintiffs, retaining all the rest of the leased property; and certainly Strachan would not have been in position to legally hold possession of the land he had sold. When the plaintiffs purchased the upper farm they became the landlords as to that farm, and there is no reason why they might not make an agreement with the tenant for the annulment of the lease. It may be that, under the terms of the lease, Neece brothers were bound to use defendants' farming equipment in operating the plaintiffs' lands during the term of the original lease. If so, then it would seem that the Neece brothers have violated their agreement with the defendants and would be liable to the defendants in damages. In any event, we hold that the plaintiffs were in the actual possession of their land and that they were ousted by the defendants, and that they are entitled to possession as against the defendants; and therefore the judgment under review must be affirmed.

It is so ordered.

HOLCOMB, C. J., FULLERTON, PARKER, and MOUNT, JJ.,
concur.

Oct. 1919]

Statement of Case.

[No. 14893. Department Two. October 15, 1919.]

**AUGUST WEIFFENBACH, *Appellant*, v. PUGET SOUND
BRIDGE & DREDGING COMPANY *et al.*, *Respondents*.¹**

EVIDENCE (185)—OPINION EVIDENCE—SPECIAL KNOWLEDGE—VALUES. In a subcontractor's action for an accounting upon a county building contract, the superintendent for the county is a competent witness as to the amount and reasonable value of extras claimed, even though his allowance thereof as superintendent may not have been conclusive under the contract.

CONTRACTS (101) — CONSTRUCTION — EXTRAS. In an action on a subcontract, requiring performance "in strict accordance" with the general contract, which plainly provided for bronze window casings, plaintiff cannot claim that his contract provided for galvanized iron, and that the bronze constituted an extra.

COSTS (4, 17)—APPORTIONMENT—EQUITY—DISCRETION. The apportionment of costs in an equitable suit rests in the discretion of the court.

SAME (4). A subcontractor's action on a contract for a county building is an equitable one, in which costs may be apportioned, where it seeks a restraining order against the county and involved a long accounting between the parties, and the complaint on its face was in the nature of a lien foreclosure.

SAME (8)—PREVAILING PARTY—EXCESSIVE CLAIM. Where plaintiff, in an equitable case, filed an outrageously excessive and fraudulent claim for extras and falsely testified that it was correct, and the amount allowed him was never disputed, costs are properly awarded in favor of the defendants.

Appeal by plaintiff from a judgment of the superior court for King county, Jurey, J., entered July 23, 1917, upon findings allowing a part of plaintiff's claim, in an action on contract, tried to the court. Affirmed.

Preston & Thorgrimson, Frederick C. Kapp, Edwin H. Flick, and Flick & Paul, for appellant.

Roberts & Skeel, for respondent Puget Sound Bridge & Dredging Company.

Fred C. Brown and Howard A. Hanson (S. M. Brackett, of counsel), for respondent King county.

¹Reported in 184 Pac. 321.

MOUNT, J.—This action was brought to recover \$14,510.69, a balance alleged to be due the plaintiff upon a subcontract for certain construction upon the King county courthouse, and also for \$79,200.33 for alleged extras furnished upon that building. The complaint prays for a judgment against the Puget Sound Bridge & Dredging Company for \$95,696.82, with interest; for an attorney's fee of \$7,500; for such judgment against King county as may protect the plaintiff in case judgment may not be enforced against the other defendants; and for an order restraining King county from making further payments to the Puget Sound Bridge & Dredging Company. The bonding companies were made parties because of being sureties upon the main contractor's bond for the faithful performance of the original contract. Several defenses were interposed by the Puget Sound Bridge & Dredging Company and the county. The defendants admitted the balance alleged to be due upon the contract, but denied the amount claimed as extras, and, by cross-complaint, alleged damages for imperfect work and materials and delay in the performance of the work. Upon these issues the case was tried to the court without a jury. The trial occupied six weeks' time of the trial court. The record is voluminous. The trial involved an accounting between the county, the original contractor and the subcontractor, and the reasonable value of the work and materials claimed as extras. At the conclusion of the trial, the court found that the county was indebted to the principal contractor, the Puget Sound Bridge & Dredging Company, in the sum of \$33,616.67; that the Puget Sound Bridge & Dredging Company was indebted to the plaintiff in the sum of \$33,276.93; and ordered that the amount found due from the county to the Puget Sound Bridge & Dredging Company be deposited with the clerk of the superior court; that the

Oct. 1919]

Opinion Per MOUNT, J.

amount due the plaintiff be paid from that fund; and that, after certain amounts found due the interveners had been paid, the balance be paid to the plaintiff. The court also ordered that the defendants were entitled to their costs. The plaintiff has appealed from that decree.

The principal facts may be briefly stated as follows: In July, 1914, King county entered into a contract with the Puget Sound Bridge & Dredging Company by which that company agreed to construct a courthouse for an agreed sum. This contract was for a building consisting of a basement and two stories, according to plans and specifications, but provided that additional stories might be added within a given time. Thereafter, on August 18, 1914, the appellant entered into a subcontract with the Puget Sound Bridge & Dredging Company, by which contract the appellant agreed to furnish and install in the building all doors and trim, plate glass, hardware, outside windows, skylights, galvanized-iron cornices, etc., for an agreed sum. Thereafter, at the option of the county, three additional stories were added to the building, the work to be done at an agreed price, according to plans and specifications furnished and made a part of the contract. The subcontract between appellant and the Puget Sound Bridge & Dredging Company provided as follows:

“Whereas, the party of the first part (appellant) has examined said plans and specifications and the contract of second party with King county, Washington, and is familiar therewith, now therefore, it has been and is hereby now agreed by and between the parties hereto;

“First: That first party will do all of the work and furnish all of the material necessary and required to be done by and under the plans and specifications hereinabove referred to, in the construction and installation of all the doors and trim, all plate glass, all hard-

ware, all outside windows and hardware and plate glass, all roofing, all skylights, all metal windows and glass and all galvanized iron cornices, including everything incidental to and in connection with all of the above named items, construction and installation, all to be done in strict accordance with the contract of second party with King county, Washington, and the plans and specifications of King county as furnished to second party, and the first party does expressly agree to and in all things conform to all the requirements of King county, its architect and its superintendent of buildings, and to install all of said above work and material under the said contract and specifications to the entire satisfaction of King county, its architect and superintendent of buildings."

After the building was completed, an itemized claim for extras was made by appellant to the Puget Sound Bridge & Dredging Company, and in turn by that company to the county. This claim was referred to Mr. Aldrich, superintendent of construction for the county, who, after examining the same, certified that the county was liable to the Puget Sound Bridge & Dredging Company for the sum of \$33,616, from which should be deducted \$5,100 for defective work. Appellant claimed a larger sum, and afterwards filed notice of a claim against the county and the sureties upon the contractor's bond, in accordance with the statutes relating to bonds of contractors upon public works, and brought this suit. No money judgment was demanded against the county. The relief demanded against the county was that appellant have

"such judgment against said county of King as may be necessary to protect said plaintiff in the event of the failure of the judgments against any of the remaining defendants, to the extent that such judgment may be proper by reason of permitting the withdrawal of funds by the general contractor [the Bridge Company] in the face of the claims of plaintiff herein;"

Oct. 1919]

Opinion Per MOUNT, J.

and that the county be restrained from making further payment of reserved percentage to the Puget Sound Bridge & Dredging Company.

We find it unnecessary to mention all the points raised by the appellant. One of the points is that the trial court erred in following the allowance made by Mr. Aldrich. The respondents claimed upon the trial that the findings of the superintendent were conclusive of the amount and reasonable value of extras. The trial court was inclined to this view, but refused to so rule and went into the merit of each claimed item and the reasonable value of each article and the time necessary to install the work; and finally concluded, upon conflicting evidence, that the allowance made by the superintendent was correct upon all the items in dispute. We are of the opinion that the trial court properly so found. We shall, therefore, not follow the argument of counsel, or the evidence, upon many items in dispute; nor upon the question of the qualifications of the superintendent to pass upon the items, except as a witness as to values. As to these matters, his evidence was clearly competent.

One of the principal items in dispute was whether the outside window casings were to be of bronze or galvanized iron. It is claimed by the appellant that the contract provided for iron, but that he was required to substitute bronze, for which he claimed an extra amounting to \$6,600. It is plain from the original contract that these window casings were to be of bronze, and a reference to the paragraph of the subcontract, above quoted, makes it plain that appellant was to do his work "in strict accordance with the contract of second party with King county." So the trial court properly found that this item was not an extra.

Appellant finally contends that the court erred in assessing costs against the appellant. It is argued that

the action is a law action and that, since appellant obtained judgment, he was entitled to his costs, under Rem. Code, § 476. We have held that the apportionment of costs in an equitable suit rests in the discretion of the court. *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652; Rem. Code, § 493.

There can be no doubt that this was an equitable action, because the complaint prays for a restraining order against the county and for equitable relief. The trial of the case involved a long accounting between the parties, and the complaint upon its face is in the nature of a lien foreclosure seeking to hold the sureties upon the statutory bonds of the original contractor. The decree entered was a decree in equity. If there can be a case where the plaintiff is liable for costs, though he succeed in part, this is such a case, for here the appellant filed an outrageously excessive and fraudulent claim for extras and testified that it was correct, when it was afterwards clearly proved to have been made fraudulently. The amount allowed to the appellant by the court was never disputed by any of the respondents. For all these reasons, we are satisfied that the trial court properly awarded costs in favor of the respondents.

We find no error, and the judgment appealed from is therefore affirmed.

HOLCOMB, C. J., PARKER, BRIDGES, and FULLERTON. JJ., concur.

Oct. 1919]

Opinion Per BRIDGES, J.

[No. 15220½. Department Two. October 15, 1919.]

WINTLER ABSTRACT & LOAN COMPANY, *Appellant*, v.
CHARLES B. SEARS *et al.*, *Respondents*.¹

CHATTEL MORTGAGES (49, 50) — RIGHTS AND LIABILITIES — USE BY MORTGAGOR—CONVERSION OR INJURY TO PROPERTY. Notwithstanding a chattel mortgage creates a lien only and conveys no title, a mortgagor of abstract books has no right to impair the security by taking and selling photographic reproductions of the books, in view of Rem. Code, § 1111, giving the mortgagee the right to maintain an immediate action for foreclosure, if there is reasonable cause to believe that the property will be destroyed, lost, or removed, and § 3669, making injury to the same a misdemeanor; since making the secret information public must be considered an unlawful destruction of the security.

SAME (78) — FORECLOSURE — SALE — PROPERTY INCLUDED — PHOTOGRAPHIC COPIES OF ABSTRACT BOOKS WRONGFULLY TAKEN. Without deciding whether a chattel mortgage of abstract books covers photographic reproductions unlawfully taken by the mortgagor and sold to a third person, a decree of foreclosure and sheriff's sale particularly describing the books only, does not pass title to the copies, or authorize a possessory action to recover the copies.

Appeal from a judgment of the superior court for Clarke county, Reynolds, J., entered July 29, 1918, upon granting a nonsuit, dismissing an action to recover personal property and for damages. Affirmed.

Crass & Hardin, for appellant.

McMaster, Hall & Drowley, for respondents.

BRIDGES, J.—This action was brought to recover the photographic reproductions of certain mortgaged abstract books and records, and to recover damages. The trial court nonsuited the plaintiff, and this appeal is from the judgment dismissing the action.

The facts are substantially as follows: In the year 1912, the Clarke County Abstract & Loan Company

¹Reported in 184 Pac. 309.

was the owner and in possession of certain real estate and certain records, books, plats, maps, instruments, machines, furniture and fixtures, constituting a complete plant used in the conduct of its business as a maker and seller of abstracts of title to real property. On August 10, 1912, the Clarke County Abstract & Loan Company, in order to secure a note of twenty-four thousand dollars, executed and delivered to Jessie M. Wintler, as trustee, a mortgage upon its real estate and upon the above-mentioned personal property. One clause of the mortgage is as follows:

“And the said mortgagor mortgages also to the mortgagee as additional security for the said note, all of its plant, used in the conduct of its business as engaged in the compilation and sale of abstracts of title to real property and in making loans and other like business, and consisting of all its records, books, plats, maps, instruments, machines, furniture and fixtures, and all other of its equipment as the same now exists and is located at No. 607 Eleventh Street, Vancouver, Washington, or as the same may hereafter be renewed, added to, or enlarged.”

After giving the mortgage, the Clarke County Abstract & Loan Company continued in possession of the mortgaged property and continued the abstract business. It failed to make the payments required by the terms of the note and mortgage, and on October 26, 1915, the trustee commenced an action to foreclose the mortgage. While this action was pending, the Clarke County Abstract & Loan Company made photographic copies of all of the books and records of the abstract plant and sold them to Charles B. Sears and C. W. Knowles, to be used in the same county. Afterwards the mortgage was duly foreclosed, and on April 22, 1916, the property was sold by the sheriff and the mortgagee became the purchaser at the sale. Thereafter the mortgagee and the persons for whom she was

Oct. 1919]

Opinion Per BRIDGES, J.

acting as trustee, together with one or two others, organized the appellant corporation, and the property obtained by purchase at the sheriff's sale was conveyed to it. After the photographic reproductions were sold to Sears and Knowles, they formed the Sears Abstract & Loan Company, which continued to use the photographic copies and to make therefrom abstracts of title to real estate, up to the time of the beginning of this action. On December 26, 1916, the Sears Abstract & Loan Company executed and delivered to the Vancouver National Bank a chattel mortgage covering the photographic copies, together with other personal property. This mortgage was given to secure a bona fide indebtedness owing to the bank. It appears that all of the respondents had actual knowledge of the existence of the mortgage to Jessie M. Wintler and the taking and sale of the photographic copies.

The chief legal question involved is, may a mortgagor of a set of abstract books and records lawfully, and without violating any of the rights of the mortgagee, make photographic copies of such books and records for the purpose of using the same after the mortgage is foreclosed, in the business of making abstracts of title to property, or selling the same to be used for a like purpose. In discussing this question it must always be kept in mind that in this state a mortgage does not serve to convey the title, but creates a lien only, leaving the title in the mortgagor. *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Richter v. Buchanan*, 48 Wash. 32, 92 Pac. 782; *Nettleton v. Evans*, 67 Wash. 227, 121 Pac. 54.

Apparently the question involved here is one of first impression, for no cases in point are cited in the briefs, and the somewhat extended search which we have made fails to reveal any. There is a line of cases cited

by appellant which holds that an author, at common law, has a property in his manuscript, and may obtain redress against one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication. The case of *Press Publishing Co. v. Monroe*, 73 Fed. 196, 51 L. R. A. 353, is illustrative of this principle; but those cases cannot help us here because there the owner was the complaining party, while here the one who complains holds only a mortgage lien. Nor—and for nearly the same reason—can we get any light from that line of cases where a photographer, employed to take certain photographs of the employer, uses his negatives or plates to take additional pictures, to be sold to others or to be put to some other use. *Klug v. Sheriffs*, 129 Wis. 468, 109 N. W. 656, 119 Am. St. 967, 7 L. R. A. (N. S.) 362; *Levyreau v. Clements*, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397; *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849, Ann. Cas. 1914B 374, 42 L. R. A. (N. S.) 386; *Corliss v. Walker Co.*, 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283.

The respondents contend that the mortgagor, being the owner of the property, had a right to take these photographs and dispose of them, provided he did thereby no unnecessary damage to the mortgaged property; that the mortgage did not cover the photographs, and therefore could not be foreclosed as to them. The lower court seems to have also taken this view of the case. We cannot believe that the only right which a mortgagee has is to foreclose his mortgage. The mortgagor's ownership is not unqualified; he may not do with the property as he sees fit; he may use it in the usual and customary way, doing no unnecessary damage; but he may not, over the objections of the mortgagee, use the property in any unusual, unc customary or unexpected way, and particularly so if such use greatly injures the property or depreciates its value.

Oct. 1919]

Opinion Per BRIDGES, J.

The mortgagee has, and in the very nature of the relation must have, the right at all times to protect the property which gives him security, against any unusual or unnecessary damage. These principles are laid down by Jones on Chattel Mortgages. At § 451 (5th ed.) he says:

“A mortgagee, in case of apprehended danger of loss of the mortgaged property, may have a receiver appointed, even before his right to foreclose has accrued. It is sufficient to authorize the appointment of a receiver that the mortgagor is insolvent, that the property is not sufficient in value to secure the debt, and that there is still danger of its removal beyond the jurisdiction of the court. The power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted. A bill for an injunction and the appointment of a receiver may be sustained, where it is shown that these remedies are proper for the mortgagee's protection, although the time of payment set in the mortgage has not arrived.”

And, at § 490:

“A purchaser of property upon which there is a valid mortgage who consumes or sells the property or any part of it is liable to the mortgagee for the damages so occasioned him; and it makes no difference that the purchaser took the property in hostility to the mortgage, and denying that it was an existing lien.”

The same general principle has been recognized by our legislature and enacted as a part of the laws of this state. Section 1111, Rem. Code, provides that, where a debt secured by mortgage is not due and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he may maintain an immediate action for foreclosure of his mortgage. Section 3669 of the same volume provides that any mortgagor of personal property who, with intent to hinder, delay or defraud the mortgagee,

shall injure or destroy such property or any part thereof, or shall conceal the same or remove it from the county without the consent in writing of the mortgagee, or who shall sell or dispose of the same or any interest therein, shall be guilty of a misdemeanor.

In the instant case, the chief value of the security was not in the abstract books themselves, but in the information contained in them. Any act which would make either the books and records, or the information contained in them, less valuable would to that extent lessen the value of the security. The mortgage not only covered the books themselves, but the information contained in them; and the making public of that secret information must be considered an unlawful destruction of the security. If one set of photographs may be lawfully taken and sold for use, so may a dozen sets of photographs be taken and sold; and thus what was ample security has become almost valueless. It would be small comfort to the mortgagee to tell him that he must be satisfied if the books themselves have not been injured and if they still contain the original information. That doctrine would take the kernel and leave the shell. If one mortgages a house, used only as a dwelling, he would not subsequently be permitted to convert that mortgaged property into a stable; or if one mortgaged a high-priced pleasure automobile he would not thereafter be permitted to use it as a common truck, although he might not make any physical changes in the conveyance. We have no doubt that if this mortgagee had undertaken to enjoin the taking and selling of these photographs, or had sought to have a receiver appointed to take charge of the property because of such taking and sale, or had commenced suit to foreclose her mortgage because of the depreciation of the security resulting from such taking and sale, she must have prevailed. Any other rule of law

Oct. 1919]

Opinion Per BRIDGES, J.

would deprive abstract books of nearly all their commercial value; for who would hereafter lend money upon abstract books as security, knowing that one, or more sets of photographic copies may afterward be lawfully taken and sold, to be used in opposition to the mortgaged property? The same rule of law which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property should also permit him to enjoin any act which would wholly or partially destroy the value of that property. We therefore hold that, in this case, the mortgagor did not have the right, over the objections of the mortgagee, to take and sell these photographic copies.

But it does not necessarily follow that the appellant can maintain this suit. This action is maintained upon the principle that the mortgage covered the photographic copies and that it was foreclosed as to those copies, and that, when the original mortgagee became the purchaser at the sheriff's sale, she purchased these copies along with the rest of the personal property, and that she thereafter conveyed the same to the appellant. If it be conceded that, under any circumstances, the purchaser at the sale might maintain a possessory action such as this, yet we are forced to the conclusion that the appellant is not in position to maintain this action. The decree of foreclosure gives a particular description of the personal property which was ordered sold. These photographic copies are not included in this description. The sheriff's bill of sale to the purchaser gives an itemized statement of the property sold, and these photographic copies are not included. It follows that the appellant cannot be the owner or entitled to the possession of these photographic copies, and cannot, therefore, maintain this suit.

While we decide that a mortgagor of abstract books and records has no right, as against the mortgagee, to take and sell photographic copies thereof, and that the mortgagee would have his action to enjoin such taking and sale, yet, where the reproductions have been taken and sold, we expressly do not decide whether such copies would be included within the mortgage, nor do we decide whether the mortgagee's action would be a possessory one, such as the one we are dealing with, or one to enjoin the use of such copies, or for their destruction, or a straight action for money damages. Having decided that the appellant is not in position to maintain this action, it is not necessary to determine the form of the proper action or the exact nature of the remedy.

Judgment affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and MOUNT, JJ.,
concur.

[No. 15327. Department One. October 15, 1919.]

CONNOR & GROGER, INCORPORATED, *Plaintiff*, v. FOREST
MILLS OF BRITISH COLUMBIA, LIMITED, *Defendant*.¹

SALES (165)—WARRANTY—BREACH—MEASURE OF DAMAGES. The measure of damages for breach of warranty as to the quality of a car of lumber sold is the difference between the actual value at the time and place of sale and its value at the same time and place had it been as warranted.

SAME (165). The measure of damages for breach of warranty as to the quality of lumber, sold upon a bill of lading without opportunity to inspect it and bought for resale at Duluth, Minnesota, cannot be shown by proof of its actual value in New York or Pennsylvania, where the seller had no notice it was to be diverted to any other market.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered January 22,

¹Reported in 184 Pac. 319.

Oct. 1919]

Opinion Per MITCHELL, J.

1919, upon findings in favor of the plaintiff, except as to an offset, in an action for damages for breach of warranty, tried to the court. Reversed on defendant's appeal.

Baxter & Jones, for plaintiff.

Bronson, Robinson & Jones, for defendant.

MITCHELL, J.—This cause was tried without a jury, upon the third amended complaint of Connor & Groger, Incorporated. After alleging that each party to the suit was a corporation, the complaint alleged, in substance, that in August, 1914, P. C. Leonard, doing business as the Alliance Lumber Company, of Seattle, Washington, in consideration of \$1,200.17, purchased from defendant, Forest Mills of British Columbia, Limited, of Revelstoke, British Columbia, without opportunity of examination, a car load of lumber shipped from Comaplix, British Columbia, for delivery at Duluth, Minnesota, warranted to be "No. 1 and No. 2, clear red cedar siding, according to grades as established by the British Columbia Mountain Lumber Manufacturers Association"; that defendant knew P. C. Leonard, doing business as the Alliance Lumber Company, bought the lumber for resale, while the lumber was in transit; that P. C. Leonard sold it to Proctor & Groger, Incorporated [name since changed to Connor & Groger, Incorporated], under a warranty the same as originally sold by defendant; that Proctor & Groger, Incorporated, diverted the lumber and sent it to Wilkesbarre, Pennsylvania, where it resold the lumber to a dealer under the same kind of a warranty as to quality and grade; that, upon the arrival of the lumber at Wilkesbarre, it was discovered to be not up to grade or quality as warranted; that the dealer or customer at that place refused to accept it, and that the expenses

and charges incurred in disposing of it, and the difference in its value as it was and as it would have been had it been of the quality as warranted, caused plaintiff damages in the sum of \$1,000. Paragraph seven of the complaint is as follows:

“That plaintiff called upon the said P. C. Leonard for payment for said damages so suffered, and said Leonard satisfied plaintiff’s claim against him by assigning to plaintiff his right of action against the defendant, which plaintiff now holds.”

A general demurrer to the complaint was filed, and upon its being overruled, defendant filed an answer, denying the allegations of the complaint, except it admitted it sold to Leonard the car of lumber and that the complaint contained a copy of the invoice. Further, the answer alleged affirmative matter which, with plaintiff’s reply thereto, requires no discussion here. At the commencement of the trial, counsel for defendant, in effect reiterating its general demurrer, objected to the introduction of any evidence in support of the complaint.

The objection being overruled, the trial proceeded upon the theory that, upon showing the lumber to be of a quality inferior to the original warranty of defendant, the plaintiff’s measure of damages would be the difference between the offer made by the dealer at Wilkesbarre, Pennsylvania, and the amount received there for the lumber, less necessary expenses and charges. The evidence to establish the amount of damages, which was received over specific objections made from time to time as well as the general objection by the defendant, showed, in substance, that the customer at Wilkesbarre, Pennsylvania, had agreed to pay plaintiff \$1,827.02 for the lumber, which amount less freight of \$355.52 would leave \$1,471.50 plaintiff would have received for the lumber; whereas, after expenses, testi-

fied to have been necessary, in the sum of \$308.94, the lumber was sold, a portion at Wilkesbarre, Pennsylvania, and the rest at Sidney, in the state of New York, for \$705.68, leaving net the sum of \$324.74, which taken from \$1,471.50, which plaintiff would have received had the lumber been as originally warranted, leaves the sum of \$1,146.76 loss.

The testimony shows Leonard was paid "\$1,200 and better" for the lumber by plaintiff. Leonard, in writing, without stating the consideration therefor, assigned to plaintiff all his rights against defendant for shipping inferior stock. There was evidence tending to show much of the lumber was not up to the grade mentioned in the original sale by defendant, the effect of which is strongly challenged by defendant—an immaterial controversy as we view the whole case. The pleadings and proof are silent as to any specific damages or loss suffered by Leonard; nor is there any testimony to show the market conditions as to price for the grade of lumber claimed by plaintiff to have been actually sold by defendant to Leonard, at Duluth, Minnesota, or elsewhere than at Wilkesbarre, Pennsylvania, and Sidney, New York.

At the conclusion of plaintiff's proof, defendant moved for a nonsuit on the ground that no cause of action had been proven against it. The motion was denied, whereupon defendant introduced evidence in support of its affirmative answer. The court made findings of fact that plaintiff was entitled to damages in the sum of \$1,146 and interest, and that defendant was entitled to an offset with interest, and entered judgment accordingly. Each party took proper exceptions to adverse findings and has appealed from that portion of the judgment adverse to it.

For the purposes of the case it may be assumed, as contended for by plaintiff, that the proof shows de-

fendant sold the lumber to Leonard knowing he intended to resell it, and that, under such circumstances, it is the law Leonard was justified in selling it under the same warranty or representations as to quality that he had purchased it, and that his customer could have recourse on him for damages if the quality of the lumber was inferior, which would be the measure of Leonard's loss as against defendant, although Leonard had not actually reimbursed his vendee. However, such assumption is upon the understanding that all the transactions occurred in the same place or market and about the same time. For the purposes of the case it may be further assumed, as contended for by plaintiff, that, when one sells lumber representing it to be of a certain grade, knowing his vendee intends to resell it, and the vendee does resell it with the same warranty or representation as to quality, and the subvendee sustains a loss by reason of the inferior quality of the lumber, the subvendee may, in the absence of a judgment against his vendor, or any reimbursement other than an assignment of his vendor's right of action against the original vendor, sue and recover damages on the assignment against the original vendor, provided the proof and damages are within the scope of the liability involved in the sale by the original vendor. The qualifications just mentioned suggest the weakness of plaintiff's case. This is not an action to rescind the purchase and recover the purchase price, nor one for fraud and deceit, but one for breach of warranty or representations as to the quality of personal property. In the case of *Abrahamson v. Cummings*, 65 Wash. 35, 117 Pac. 709, this court, citing many cases, said:

“This was not an action to rescind the purchase and recover the purchase price, but to recover damages for breach of warranty. The measure of damages in such a case, according to the universal trend of authority,

Oct. 1919]

Opinion Per MITCHELL, J.

is the difference between the actual value of the property at the time and place of sale, and its actual value at the same time and place had it been what it was warranted to be."

If reliance be had upon the allegation and proof that Leonard purchased the lumber upon a bill of lading and sight draft, without any opportunity to examine the lumber, the answer is that, by his directions and according to the invoice he received, the lumber was shipped for delivery to him at Duluth, Minnesota, and there is no proof, either direct or by the slightest inference, that defendant ever had any notice or intimation the lumber was to be diverted to any other market, and it is plain the record contains no proof of the market value of such lumber as plaintiff claims it received, except at Wilkesbarre, Pennsylvania, and Sidney, New York.

Not having responded to the rule as to the measure of damages for the breach of such a contract, concerning time and place of the original sale and delivery, plaintiff was not entitled to recover. We understand defendant, waiving all claims on account of an offset allowed it in the judgment, insists upon its rights to a judgment of nonsuit. Our conclusion on defendant's appeal disposes of the cross-appeal without the necessity of any further comment thereon.

The judgment is reversed on defendant's appeal, and the cause is remanded with directions to the lower court to enter judgment of nonsuit in favor of defendant.

HOLCOMB, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

[No. 15329. Department One. October 15, 1919.]

LOUISA E. GARRING, *Appellant*, v. J. A. STEPHENS *et al.*,
Respondents.¹

EVIDENCE (100)—DECLARATIONS—SELF-SERVING—ADMISSIBILITY OF EVIDENCE OF NONDELIVERY OF DEED. Where a deed was made to a minor and delivered to the grantor's attorney and came into the possession of the grantor's administrator, it is admissible to show the statements of the grantor, after she had conveyed the land to another, that the deed was made at the suggestion of her attorney in anticipation of suits, and was to be returned to her when called for, and that she had requested its return; since she then had no self interest to subserve.

SAME (42)—COMPETENCY—MOTIVE OR INTENT. If the intention of the grantor in delivering a deed is doubtful, evidence of subsequent acts of the grantor is competent as to the intention at the time of delivering it to a third person.

Appeal from a judgment of the superior court for Lewis county, Back, J., entered December 2, 1918, in favor of the defendants, in an action of ejectment and to quiet title, tried to the court. Affirmed.

A. E. Rice and *L. J. Birdseye*, for appellant.

W. H. Cameron and *C. D. Cunningham*, for respondents.

MITCHELL, J.—This action was commenced in July, 1917. It is the statutory action of ejectment and to quiet title. It was tried without a jury, and resulted in a judgment for defendants, from which judgment plaintiff has appealed.

Stephens and wife, as such, and the Eastern Railway & Lumber Company, a corporation, appeared separately, and in addition to general denials, each interposed several affirmative defenses, concerning all of which evidence was introduced. There is involved

¹Reported in 184 Pac. 314.

Oct. 1919]

Opinion Per MITCHELL, J.

the validity of an instrument purporting to be a deed, and upon the threshold of the inquiry, appellant admits she is not entitled to prevail if it shall be determined that deed was invalid. Having reached the conclusion the instrument did not operate as a conveyance of title, it will, therefore, be useless to consider any other feature of the controversy.

The instrument just referred to was made by Jane E. Bryan on October 19, 1905, and purported to convey to William W. Miller a tract of land which included the lesser tracts involved in this action. At that time, and for many years prior thereto, she owned and lived on the land described in the deed, and continued to reside thereon until her death, April 27, 1907. During those years there lived with her in the same home her nephew, Allen Miller, and his wife and their son, William W. Miller, the latter being the grantee named in the deed referred to. Allen Miller and wife and their son continued to live on the place a number of years after the death of Jane E. Bryan. Jane E. Bryan and Allen Miller were considerably in debt on October 19, 1905. Her deed to William W. Miller, who at that time was twelve years of age, was prepared by her lawyer (J. B. Landrum) and acknowledged before him as a justice of the peace. Only one person who was present at the execution of the deed, Mrs. Maloney, testified in the trial of this case. She testified that, after executing the deed, Jane E. Bryan handed it to her lawyer and asked him to put it on record that day, and that he said he would. In considering her testimony we bear in mind she owns a mortgage in the sum of \$1,000, made and delivered by William W. Miller to her on November 16, 1915, covering another portion of the land described in the deed to him of October 19, 1905. William W. Miller was not present on October 19, 1905, at the execution of the deed, nor is the evi-

dence clear as to when he first learned of it. The deed was not recorded until after the death of both Jane E. Bryan and her lawyer, when, on July 15, 1907, it was filed for record by Allen Miller, acting at that time as administrator of the estate of Jane E. Bryan. The testimony is silent as to when and how the deed got back into the possession of Jane E. Bryan and thence into the possession of her administrator. On October 22, 1906, Jane E. Bryan conveyed to the Oregon-Washington Railway & Navigation Company, for right of way purposes, a portion of the land described in her deed to William W. Miller. On January 15, 1907, Jane E. Bryan, by a warranty deed acknowledged before her same lawyer, acting at that time as a notary public, conveyed to Allen Miller certain property which included the property in controversy here. That deed was filed and recorded two days later, and the property described in it is a portion of the land described in the deed from her to William W. Miller. Allen Miller and wife several times mortgaged the property they finally sold to the respondent. The Eastern Railway & Lumber Company operated a mill near by, and shortly after Allen Miller acquired the property from Jane E. Bryan, continuous complaint and threatened litigation on his part against the lumber company on account of sawdust and other debris from the mill resulted in the purchase, on September 25, 1911, by the lumber company from Allen Miller and wife, of the seven and one-half acres, ever since owned, occupied and greatly improved by the lumber company. The consideration for this transfer was four thousand dollars, and the property was a part of that described in the deed of October 19, 1905, by Jane E. Bryan to William W. Miller, and also in the deed of January 15, 1907, by Jane E. Bryan to Allen Miller. In the years 1912 and 1913, Allen Miller and wife gave mortgages upon the

Oct. 1919]

Opinion Per MITCHELL, J.

property now owned and occupied by the respondents Stephens and wife, who, through foreclosure proceedings in the year 1916, became the purchasers at the sheriff's foreclosure sale. This property now owned by them was a part of that described in the deed of Jane E. Bryan to William W. Miller, and also in the later deed of Jane E. Bryan to Allen Miller. There is abundant testimony in the record to show that, from the time Allen Miller received his deed from Jane E. Bryan in January, 1907, until he disposed of the properties involved in this action, he occupied, used, let, paid taxes on, and in good faith claimed it as his own, within the knowledge and without any protest from William W. Miller, both before and after he became twenty-one years of age, other than the making and delivery by him of a quitclaim deed to appellant about April 27, 1916.

Shortly after the conveyance to Allen Miller, an attorney for the respondent lumber company, engaged in settling the complaints of Allen Miller, called at his home and discussed the matter with Jane E. Bryan, who formerly had been handling the property as her own. Concerning that conversation, the attorney testified at the trial in this case as follows:

"I went right over to see Jane Bryan to see what could be done. It was in the latter part of February, 1907. I asked Mrs. Bryan who owned that property. She told me Allan Miller owned it, that she had deeded it to him, I think, about the month of January, 1907. It was then I called her attention to this deed I had seen in Landrum's office to Willie Miller. She told me that Landrum and Miller (meaning Allen Miller) had come to her when threat was made to bring suit on obligations they owed on different notes; that Landrum had suggested that this deed be made and put with him and that she had made the deed with the instruction that it be returned to her when she called for it. That she had asked Landrum for it and was told that it had

been mislaid. She seemed surprised that the deed was still in existence."

This testimony was admitted over the objection of appellant and constitutes the principal assignment of error on the appeal. We think the testimony was admissible. It is perfectly clear the controversy here hinges upon the question of the delivery of the deed—the final act without which all other formalities are ineffectual to the transfer by deed of the title to land. True, the delivery of a deed need not be directly or immediately to the grantee, but it must pass beyond the control of the grantor, which of itself is a question of intention to be determined as a fact by a consideration of all the surrounding circumstances. The rule suggested by appellant and found in 1 Devlin on Deeds (3d ed.), § 281a: "The grantor's acts and declarations made or done in his own interest several months subsequently to his delivery of the deed are not admissible in evidence as showing his intent in delivering the deed," is not applicable here, because, at the time the grantor made the declarations referred to in the testimony complained of, she had already sold and delivered possession of the land to another, and hence had no self-interest to subserve by those declarations. Again, it is contended that declarations of the grantor, made after parting with his title and in disparagement of it, are inadmissible when made in the absence of the grantee. But the rule assumes the very thing in dispute here, namely, delivery of the deed, which is essential to the transfer of the title. Both reason and authority are to the effect that, if the intention of the grantor in delivering a deed is doubtful or equivocal, evidence of subsequent acts of the grantor is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to a third person. *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W.

Oct. 1919]

Syllabus.

307; *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E 703.

The consideration of this assignment of error disposes of all other assignments made by appellant as to the admissibility of other evidence and leaves the case, restricted, as it has been, to the consideration only of the validity of the deed to William W. Miller, to be determined upon the sufficiency of the evidence to justify the judgment. Practically all, or at least all of the controlling parts, of the evidence has been set out so as to obviate the necessity of any repetition or analysis to fortify the conclusion, already mentioned, that the judgment is correct; and it is hereby affirmed.

MACKINTOSH, FULLERTON, MAIN, and TOLMAN, JJ.,
concur.

[No. 15338. Department Two. October 15, 1919.]

ELIZABETH C. GOWEY, *Appellant*, v. SEATTLE LIGHTING
COMPANY, *Respondent*.¹

MASTER AND SERVANT (20-1) — WORKMEN'S COMPENSATION ACT — "WORKSHOP" — STATUTES. A gas company's general office for clerical work in which a clerk operated a power-driven machine to make zinc plates or stencils for printing gas bills is a "factory" or workshop, within the meaning of the workmen's compensation act, Rem. Code, §§ 6604-3, 6604-4, precluding actions for personal injuries by employees.

SAME (20-1) — EXTRA HAZARDOUS EMPLOYMENT — OPERATING STENCIL IMPRINTOR. The operation of a power-driven machine to make zinc plates or stencils for printing gas bills, by a woman clerk employed in the general office at clerical work for the larger part of the time, is "extra hazardous," within the workmen's compensation act, Rem. Code, §§ 6604-3, 6604-4, precluding actions for personal injuries by employees; and it is immaterial that, when the machine was in perfect order, injury was practically impossible.

SAME (121-2) — WORKMEN'S COMPENSATION ACT — REMEDIES — STATUTES — AMENDMENT. Laws 1917, p. 487, amending Rem. Code, § 6604-8,

¹Reported in 184 Pac. 339.

relating to employers who are in default in contributing to the accident fund, does not preserve to the injured workman a right of action against such an employer.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 11, 1919, upon the pleadings and stipulated facts, dismissing an action for personal injuries sustained by a servant. Affirmed.

James Kiefer, for appellant.

Poe & Falknor, for respondent.

PARKER, J.—The plaintiff, Elizabeth C. Gowe, commenced this action in the superior court for King county, seeking recovery of damages for personal injury which she claimed resulted to her from the negligence of the defendant lighting company. One of the defenses set up by the defendant in its answer is that the injury for which the plaintiff seeks recovery was received by her while engaged in an extra-hazardous employment within the meaning of the workmen's compensation act, and that therefore she must recover, if at all, from the accident fund provided for in that act. The cause was decided by the court in favor of the defendant and against the plaintiff upon this defense at the beginning of the trial, as a matter of law. While the question was first presented to the court in the form of a motion for judgment in favor of the defendant upon admitted facts appearing in the pleading, there were some additional facts agreed upon by counsel for both sides and stated to the court upon the argument of the motion. These additional facts appear in this record by statement of facts duly settled and signed by the trial judge. From the judgment of dismissal rested upon the facts so appearing, the plaintiff has appealed to this court.

The controlling facts may be summarized as follows: "defendant is . . . a corporation . . . and

Oct. 1919]

Opinion Per PARKER, J.

owns and operates a plant for the manufacture and sale of gas in the city of Seattle, and maintains in connection therewith general offices On the 24th day of April, 1918, the plaintiff was in the employment of the defendant and engaged in the operation of a Multiple Head Imprinter of the Type 'F,' and that it was the duty of the plaintiff, in the operation of said machine, to make certain zinc plates or stencils for the printing of gas bills. . . . said machine is run by electric power, and in its complete condition has in front of the dies a metal guard placed thereon to prevent the crushing or catching of fingers of the person operating said machine, and prior to said 24th day of April, 1918, and by the orders of said Miller in charge of said office, the said guard had been removed from said machine in order to speed up the operation thereof, and said removal was unknown to the plaintiff, and had said guard been on said machine the accident to plaintiff could not possibly have occurred." The machine "was used in the office of the defendant as an office device or appliance." The plaintiff was a clerk in the general office of the defendant, and while the larger part of her duties were clerical, it was also a part of her employment to operate this machine. Plaintiff's hand was injured by the die of the machine coming down upon her hand when the electric power was applied by another, at a time when she was not expecting the machine to start. In view of our conclusion touching the correctness of the decision of the trial court, it is not necessary for us to further notice the manner or extent of the plaintiff's injury, or the alleged negligence of the defendant.

Among the extra-hazardous works enumerated in the workmen's compensation act, Rem. Code, § 6604-2, are "factories, mills and workshops where machinery

is used." In § 6604-3, as amended by Laws of 1917, p. 474 "factories" and "workshop" are defined as follows:

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing, or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control."

In section 6604-4, Rem. Code, as amended by Laws of 1917, page 477, under the general heading "Factories Using Power-Driven Machinery" are enumerated, among other things, for the purpose of specifying the amounts to be contributed towards the accident fund by employers, the following: "stamping tin or metal," "canneries, metal stamping extra"; "zinc, brass or lead articles or wares not otherwise specified"; "printing." It seems plain to us that the word "factories," as used in the general heading under which these enumerations appear, is used in a very general sense and means workshops as well, since there is no general heading containing the word "workshop," and the above quoted items are as appropriate to work done in workshops as in factories.

Was the office of the defendant a "factory" or "workshop" wherein power-driven machinery was being employed, in so far as the operation of this machine by electric power in the making of zinc plates or stencils was concerned, within the meaning of the workmen's

Oct. 1919]

Opinion Per PARKER, J.

compensation act? We think it was. It is plain that the machine was a power-driven machine and that the operation of it in the making of zinc plates or stencils was the manufacture and change of zinc plates into the form of stencils; we also think the conclusion cannot be escaped that such work was extra-hazardous, regardless of the fact that it may have been carried on in the general offices of the defendant rather than in some place apart from the offices. Plainly, it was not clerical work. Its character, to our mind, was not different than if it had been carried on in a manufacturing plant devoted exclusively to such work. We are equally convinced that the plaintiff was engaged in extra-hazardous work when she was operating this machine, though she also had other duties of a clerical nature, even though such duties constituted the larger part of her employment. The following decisions lend support to these conclusions: *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 311; *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608; *Replogle v. Seattle School District No. 1*, 84 Wash. 581, 147 Pac. 196; *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 334; *Remsnider v. Union Sav. & Trust Co.*, 89 Wash. 87, 154 Pac. 135, Ann. Cas. 1917D 40.

Some contention is made rested upon the fact, which for present purposes we may deem as admitted, that the machine when in perfect working order with all of its attachments in place rendered injury to the operator practically impossible. Such might be said of many machines to be found in factories and workshops, but the fact remains that it was possible for the machine to be in such condition that an operator's hand could be crushed. Plainly, we think, the impossibility of injury to the operator of a machine when it is in perfect order does not render its operation

other than extra-hazardous employment within the meaning of the compensation act.

Some contention is made rested upon the fact that the defendant had failed to pay into the accident fund the amount it would be required to contribute thereto because of the employment of the plaintiff and others in the operation of this machine. This contention is rested upon Rem. Code, § 6604-8, relating to employers who are in default in such payments, and preserving to an injured workman his right of action against such defaulting employer. This, however, is no longer the law, since that section was amended by the Laws of 1917, p. 487, wherein the right of action existing in favor of an injured employee against such defaulting employer is not preserved as it was under that section as originally enacted. *Freyman v. Day*, ante p. 71, 182 Pac. 940.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

HOLCOMB, C. J., BRIDGES, and MOUNT, JJ., concur.

Oct. 1919]

Statement of Case.

[No. 15165. Department Two. October 22, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
F. Calouri et al., Respondent, v. J. T. STRATTON
*et al., Appellants.*¹

STATUTES (62) — CONSTRUCTION — CONFLICTING SECTIONS. Rem. Code, § 4711, of the school code, being later in time, controls earlier sections in the same code, so far as there is conflict.

SCHOOLS AND SCHOOL DISTRICTS (11) — BOUNDARIES — ALTERATION — REVIEW OF DECISION. Under Rem. Code, § 4711, of the school code, providing that decisions on appeal by the county commissioners shall be final unless set aside by a court of competent jurisdiction in an action brought to review the same, certiorari lies to review decisions on appeal from the county superintendent, notwithstanding the earlier section 4707 provides that decisions on appeal by the board shall be final.

SAME (11). Under Rem. Code, § 4707, providing for appeals from decisions of the county superintendent to the county commissioners, and § 4711, providing for review by the courts of the latter, appeal lies to the board from the school superintendent, and certiorari lies to the courts from the board but not from the school superintendent.

SAME (7-1-9) — BOUNDARIES — ALTERATION — PETITION — REQUISITES. Upon petition to the county school superintendent for a change of school district boundaries, the superintendent cannot radically depart from the petition and transfer from one district to another territory not described in the petition, except as necessary to correct the descriptions.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered October 1, 1918, setting aside an order of the county school superintendent changing the boundaries of a school district, on review of the decision of the board of county commissioners affirming the order. Affirmed.

John I. O'Phelan and *Fred M. Bond*, for appellants.
Herman Murray, for respondent.

¹Reported in 185 Pac. 610.

FULLERTON, J.—School district No. 24, of Pacific county, petitioned the county school superintendent of that county to “change the boundaries of school districts Nos. 6-14-24-29,” by incorporating in and making a part of the petitioning district certain described territory then forming a part of the other school districts named, which districts partially surrounded and abutted upon the petitioning district. The territory petitioned to be set over was described by sections according to the government surveys. It formed, however, a contiguous body of land. The application was set for hearing, and notice thereof given to the districts interested by the county superintendent. At the hearing, representatives of all of the school districts named appeared, and evidence was heard as to the necessity and advisability of making a transfer, at the conclusion of which the superintendent took the matter under advisement. Some days later she rendered a decision, finding it to be to the public interest that a portion of the territory described in the petition, and forming a part of districts Nos. 14 and 29, be transferred to district No. 24, and that a tier of sections, six in number, extending across the southern boundary of district No. 14, not described in the petition, be likewise transferred, and entered an order accordingly.

District No. 14, feeling aggrieved at the part of the order transferring the territory not included in the petition, appealed from that part of the order to the board of county commissioners of Pacific county. The superintendent, in response to the notice of appeal, made return of her proceedings to the board of county commissioners, and that body, at its next ensuing session, but without notice to the appellant or any of the other parties interested, entered an order approving the action of the superintendent. School district No. 14 thereupon sued out a writ of certiorari in the

Oct. 1919]

Opinion Per FULLETON, J.

superior court, directed to the county commissioners and to the superintendent, seeking a review of the orders entered. On the service of the writ, the commissioners and the superintendent appeared severally and specially and moved to quash the writ on the ground of want of jurisdiction in the superior court. These motions were overruled, whereupon the parties made a joint return showing the transaction from its inception to the final order of the county commissioners. At the hearing on the return, the superior court held the order of the superintendent, in so far as it purported to transfer territory from school district No. 14 to school district No. 24, not included in the petition for the transfer, to be null and void, and entered a judgment setting aside and holding for naught that part of the order; enjoining the parties, and all other persons interested, from acting pursuant to the order. The county school superintendent and the board of county commissioners appeal from the judgment.

The first contention made by the appellants' counsel is that the court erred in overruling the motions to quash the writ. The grounds upon which the contention is based are not quite the same with respect to the two appellants. The contention with respect to the board of county commissioners is founded upon §§ 4707 and 4434 of Rem. Code. By § 4707 it is provided that appeals from the decisions or orders of the county superintendent, when relating to the territory or boundaries of school districts, shall be taken to the board of county commissioners of the county wherein the territory lies, and § 4434 provides that the decision of the board of county commissioners on the appeal shall be final. The argument is that the legislature has the power to prescribe in what tribunal the final determination of questions of this sort shall rest, and

since they have designated the board of county commissioners as that tribunal, the courts are without jurisdiction, either by appeal or by a writ of review, to question the validity of their judgment. But we do not find the code quite consistent in its provisions relating to the conclusiveness of such orders. The section relied upon is a part of the act of the legislature known as the code of public instruction. In the chapter of that code governing appeals from the decisions of the various school authorities is another section relating to the finality of the appellate bodies. In that section (Rem. Code, § 4711), it is provided that the decisions "of appeal by . . . the board of county commissioners . . . shall be final unless set aside by a court of competent jurisdiction, in an action brought therein to review such order or decision." This section relates to the same subject-matter as does the section relied upon, and, since it is contained in the same enactment and later in time, controls in so far as there is a conflict between them. It follows, therefore, that the order of the board may be reviewed by the courts in a proper procedure brought for that purpose. The form of such a procedure seems to have been left somewhat indefinite by the statute, and was before us for consideration in the case of *Tufts v. Riffe*, 97 Wash. 500, 166 Pac. 788. In that case we held that a review by writ of certiorari was intended, affirming the judgment of the trial court, which dismissed an independent action brought for that purpose. These considerations lead to the conclusion that the motion of the county commissioners to quash the writ was properly denied.

The assignment that the court erred in overruling the motion of the county superintendent to quash the writ is based upon two grounds: first, that there was an adequate remedy by appeal; and second, that the

Oct. 1919]

Opinion Per FULLERTON, J.

writ came too late. As a question of procedure, we are inclined to think the objections are well taken. The practice contemplates, we think, an appeal to the county commissioners from the orders of the county superintendent, and a writ of review from orders of the county commissioners to the superior court. In such a review the court can direct the county commissioners to make such orders as the record on the appeal required them to make, and if such record required a change in the county superintendent's order, the court's judgment should direct the commissioners to enter an order requiring such change. To take the present case as an illustration: If the superintendent, in her order changing the boundaries of the school districts in question, included in the change territory which ought not to have been so included, it was the duty of the county commissioners, on the appeal, to enter an order directing the county superintendent to so change her own order as to make it conform to the right of the matter, and if the county commissioners erred in that duty, it was the province of the court, in its judgment on the writ of review, to direct them to enter the proper order. Since, however, the court's writ ran to the county superintendent as well as to the county commissioners, it is seen that the court has done in one form what perhaps it should have done in another. But, as it is the procedure and not the judgment that is erroneous, nothing would be gained in this instance by correcting the procedure, and we see no necessity for so doing.

The remaining question is whether the county superintendent exceeded her powers when she transferred to the petitioning district territory not described in the petition for the transfer. It is doubtless true that the county superintendent, when acting upon a petition of this sort, may exercise some degree of discretion. He

may, for example, transfer less territory than the petition requests, and may "correct any mistakes that may have been made in the description given in the petition, and in a proper case modify the boundaries described therein." *Wilsey v. Cornwall*, 40 Wash. 250, 82 Pac. 303. But these rules do not permit, we think, radical departures from the description of the petition, where the effect of the departure is to transfer territory not described in the petition. Such transfers in excess of the petition as are made necessary by a correction of the descriptions may properly be allowed, but, clearly, it would be contrary to the spirit of the statute, which is somewhat specific in prescribing the procedure, to say that the petition opened the field, leaving it optional with the superintendent to determine what territory should, and what territory should not, be transferred. Here, the transfer of the undescribed territory was not made necessary by a correction of mistakes in the description of the boundary contained in the petition, nor was the territory transferred inconsequential. On the contrary, the departure from the description was radical. In addition to the six sections of land here in controversy, twelve additional sections, making an area of eighteen square miles, were transferred.

We think the trial court rightly adjudged that the county superintendent exceeded her powers, and its judgment will stand affirmed.

HOLCOMB, C. J., MOUNT, PARKER, and BRIDGES, JJ., concur.

Oct. 1919]

Opinion Per FULLERTON, J.

[No. 15226. Department Two. October 22, 1919.]

C. H. HAYS, *Appellant*, v. C. C. BASHOR, *Respondent*.¹

CHATTEL MORTGAGES (1)—ABSOLUTE TRANSFER AS MORTGAGE. A bill of sale to a bank cashier of a donkey engine, purchased for the use of loggers, was not intended as a chattel mortgage to secure the loggers' note for \$300 advanced by the bank, where the agreement gave the makers of the note an option to pay it and take title to the engine, or to pay a sum agreed upon as rental for the engine and take back the note; since there was no obligation to pay the note and there could be no security for a debt when there was no debt.

EVIDENCE (147, 149) — PAROL — TO VARY WRITING — CONTRACT FOR SALE OF CHATTEL. A written agreement for the absolute transfer of a donkey engine, showing that it was not security for a debt, cannot be varied by parol evidence drawing conclusions from the transaction that it was intended as a chattel mortgage.

SALES (89)—TENDER (10-1)—TRANSFER OF TITLE—EFFECT OF TENDER. Under an agreement to transfer a donkey engine upon payment of an agreed price within a certain time, timely tender does not operate to transfer the title.

REPLEVIN (6) — TENDER (10-1) — TITLE OF PLAINTIFF — EFFECT OF TENDER. Replevin presupposes title in the plaintiff, and does not lie on timely tender of the price of a donkey engine; but the remedy is for breach of contract or specific performance.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered July 9, 1918, upon findings in favor of the plaintiff, in an action in replevin, tried to the court. Affirmed.

Imus & Fisk, for appellant.

Miller & Wilkinson, for respondent.

FULLERTON, J.—In this action the appellant sued in replevin to recover from the respondent possession of a donkey engine and certain described equipment connected therewith, praying in the alternative, that, if delivery of the property could not be had, he have

¹Reported in 185 Pac. 814.

judgment for the value thereof. The cause was tried by the court sitting without a jury, and resulted in a judgment in favor of the appellant for the sum of \$50. He appeals, contending that the recovery allowed him is insufficient.

In the main the facts are not in dispute. In the summer of 1913, the appellant and his then partner were engaged in, or were desirous of engaging in, the business of logging, at a designated place in Cowlitz county. The respondent was then cashier and manager of the First National Bank of Kelso. The appellant and his partner desired for use in their business a donkey engine, and found a suitable one which could be purchased from a neighboring logging company at a price of \$300 in cash. The appellant and his partner either did not have the money to make the purchase or did not wish to take it out of their business, and applied to the appellant for a loan of the amount required from his bank, offering him certain security. The respondent did not consider the security offered satisfactory and declined to make the loan. Later on the parties entered into an arrangement by which the purchase of the engine for the use of the appellant and his partner was consummated. The appellant and his partner executed their note to the bank named for the sum of \$300; the respondent purchased the engine from the logging company, taking a bill of sale therefor running to himself; and thereupon entered into the following agreement with the partners:

“This agreement, made and entered into on this the 25th day of June, 1915, by and between C. C. Bashor, of Kelso, Washington, the party of the first part, and James Burcham and Carl Hayes, of the same place, parties of the second part, witnesseth:

“The said party of the first part has this day purchased of the Cowlitz County Logging Company one 9 x 10 Smith & Watson Donkey Engine, together with

Oct. 1919]

Opinion Per FULLERTON, J.

the lines thereon, for the sum of three hundred (\$300) dollars, and hereby agrees with the said parties of the second part that they may use said donkey engine in their logging operations on the Swager property on the west side of the Cowlitz river, near Lexington, Washington, they to stand all expenses in moving said donkey engine from its present location.

“The parties of the second part have signed a note in favor of the First National Bank, Kelso, Washington, for three hundred (\$300) dollars, due September 25, 1915, with interest thereon at the rate of 10 per cent per annum until paid, and in case said note is paid when due, then and in that case the said party of the first part hereby agrees to give said parties of the second part sufficient bill of sale to said donkey engine and all lines thereon, but in case said note is not paid when due, then in that case said donkey engine is to be immediately turned over to the said party of the first part, together with the sum of \$100 as rental thereon and said engine is to be left on the west bank of the Cowlitz river near Lexington, Washington, in good running order and repair, and in case said engine is turned over to the said party of the first part by said parties of the second part as last above provided, and the rental of \$100 is paid, then said party of the first part hereby agrees to cancel and return to said second parties the \$300 note which they are giving in favor of said bank above mentioned.”

After the business had continued for a short time, the appellant's partner sold his interests therein and his interests in the partnership property to the appellant. In the agreement of sale, which was in writing, it was recited that neither of the partners had any interest in the donkey engine mentioned “unless a certain note for \$300 in favor of the First National Bank of Kelso, Washington, is paid when due, and a certain agreement made with C. C. Bashor is kept and performed.”

The appellant, subsequent to his purchase of his partner's interest, became financially embarrassed and

the respondent advanced money for his use, and finally took over his business, completed his contracts, sold the logs, and applied the proceeds of the sales to the expenses incurred in the conduct of the business and in satisfaction of the appellant's obligations. No part of the proceeds of the sales of the logs were paid upon the note, unless it was a small sum in the way of interest.

On the disputed question of fact, the appellant testified that, at the conclusion of the logging transactions, he went to the bank and there tendered to the respondent the amount due on the note, with interest, and demanded that the respondent execute to him a bill of sale of the donkey engine in accordance with the terms of the agreement above quoted; that the respondent said it was all right, and to come in about a week later, when he would fix it up; that he returned later, when the respondent told him there were other obligations due him which must be settled before the matter was concluded; that he arranged to settle these obligations, and later asked for the bill of sale, when the respondent insisted that he execute a writing of some kind, to which he objected; that the respondent then refused to deal with him further, and later removed the donkey engine to his ranch. The respondent's version of the transaction is that, when the appellant came to see him, the appellant produced a bill of sale for execution by him which included furnishings for the engine not belonging to him, and that he refused to execute it for that reason, telling the appellant to come back again and he would have a new bill of sale prepared; that he does not remember the length of time he asked to prepare the bill of sale, but thought it a much shorter time than the appellant had stated it to be; that he later prepared and executed a bill of sale for the engine, which was not taken up by the appellant; that he then

Oct. 1919]

Opinion Per FULLERTON, J.

had possession of the engine; that he later removed it to his farm and finally disposed of it. He also testified that, at the time he took possession of the engine, it had a cable line upon it, in the way of furnishings not on it when it was originally purchased. It was for this extra quantity of cable line the court allowed judgment in favor of the appellant.

It is the contention of the appellant that the transaction relative to the purchase of the donkey engine created, as between the parties, the relation of mortgagor and mortgagee. It is argued in his behalf that a contract to purchase the engine was made by him and his partner; that they borrowed of the bank the money to pay the purchase price; that this money was used by the respondent in the purchase of the engine; that the respondent took the legal title to the engine as security for the payment of the money borrowed; that a tender of payment was made prior to the institution of any proceeding to foreclose upon the security; that this tender operated to release the property from the lien, vesting title absolute in the appellant as the successor in interest of the original purchasers; and from this it is contended that the appellant has the entire interest in the property and can recover its possession in an action of replevin, or in case delivery of the property cannot be had, the value of the property.

It is true, undoubtedly, that a transfer of property, although absolute on its face, will be assumed and held to be a mortgage where it is shown that there is no other consideration for the transfer than a loan or forbearance of money, or where it appears from the entire transaction that security, and not an absolute transfer, was the intention of the parties. But the courts will never assume or hold that an absolute transfer of property creates a trust or is security for a debt where the purpose of the transfer is made clear

by the transactions between the parties, and this purpose is contrary to the idea of trust or security. This, of course, is but saying that the contract made by the parties of itself controls and fixes their rights and liabilities, and that no assumptions or presumptions will be indulged in contrary to the evident purpose and intent of the contract. In the case before us, we think it clear there was no intent or purpose to create a mortgage or to take security of any form for a loan. Contrary to the appellant's assumption, there was, in fact, no loan of money. While a note was given to the bank, there was, as between the bank and the other parties to the agreement, no obligation to pay the note. The makers thereof had the option, at the time the note became due, either to pay it and take title to the donkey engine, or pay the sum agreed upon as rental for the engine and take back the note. The respondent was evidently dealing in two capacities; in one capacity as the representative of the bank, and in the other as an individual. His acts were obligatory upon the bank, and, plainly, neither the bank nor the respondent could enforce the payment of the note. Their sole remedy, in case of failure to pay the note, was to enforce the payment of the agreed rental. It is perhaps needless to add that there can be no security for a debt where there is no debt. The language of Judge Hadley, in *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61, is fitting:

"To have created the relation of mortgagor and mortgagee between the parties, it was essential that there should have been a debt capable of enforcement by action, and which was intended to be secured by the mortgage. There could be no debt when there was no liability therefor."

When to this is added the fact that the transaction itself and the written evidence of the transaction are not in the form usual in cases of mortgage security,

Oct. 1919]

Opinion Per FULLERTON, J.

we can see no room for the conclusion the appellant would draw therefrom. We have not overlooked the oral evidence of the appellant to the effect that there was a borrowing of money and a taking of security by instruments in the form of absolute transfers, but these are but conclusions drawn by him from the transactions. His part of the agreement is in writing, and he cannot be permitted to vary or control its effect by parol.

Since the appellant's right to the property depended upon payment of an agreed price, his tender of the price, conceding it to have been timely made and sufficient in other respects, did not vest title to the property in him. In states where mortgages do not operate as a conveyance of title, but are mere liens, it is generally held, and it has been held in this state (*Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, 125 Am. St. 945, 15 L. R. A. [N. S.] 1164), that a tender of the mortgage debt before foreclosure discharges the property from the encumbrance of the lien. Such a tender, however, does not operate as a discharge of the debt. It may stop the running of interest on the debt, and it may relieve the party from the costs of an action brought to recover the debt, but it has never been held, in so far as we are advised, that it operates as a satisfaction of the debt. For the reason that it does not satisfy the debt, a tender of the purchase price on a contract for the conveyance of property does not operate to take the title from the vendor and vest it in the purchaser. So, in this instance, the tender of the purchase price gave the appellant no such title to the property as to enable him to maintain an action in replevin for its recovery. This is not saying that the appellant was without a remedy. Clearly, he could have maintained an action as for a breach of the contract, and, by a showing of circum-

stances rendering the remedy in damages inadequate, could have maintained a suit for specific performance. But the remedy of replevin, whether at common law or under the code, presupposes title to the property, either general or special, in the person seeking the recovery, and neither a recovery of the property in specie nor a recovery of its value can be had unless the person seeking the recovery has such title.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MOUNT, and BRIDGES, JJ., concur.

[No. 15234. Department Two. October 22, 1919.]

J. U. HERSHEY, *Appellant*, v. RUSSELL HANAUER *et al.*,
Respondents.¹

PLEADING (104, 114)—AMENDMENT TO CONFORM TO PROOF—EFFECT. After allowance of a trial amendment to the complaint to conform to proof, plaintiff is entitled to the benefits of the proofs which supported the complaint as amended.

BROKERS (7)—TROVER AND CONVERSION (4)—QUESTION FOR JURY—SALE OF MINING STOCK. A prima facie case of conversion and a question for the jury is made where there was evidence that defendants, as brokers, sold eleven thousand shares of plaintiff's mining stock, falsely representing that they had sold but one thousand shares, and delivered the shares to make good another sale made on the account of another.

SAME. In such a case, the acceptance by plaintiffs of a return of the shares withheld does not waive the conversion, where the acceptance was conditional and at an agreed price less than its value at the time of the conversion.

EVIDENCE (48)—COMPETENCY—MARKET VALUE—SALES. The price at which mining stock was sold on the exchange on a certain day is competent evidence of its market value at that time.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 27, 1918, upon the verdict of a jury rendered in favor of the

¹Reported in 185 Pac. 627.

Oct. 1919]

Opinion Per FULLERTON, J.

defendants by direction of the court, in an action for the conversion of mining stock. Reversed.

Mulligan & Bardsley, for appellant.

Charles H. Maloy, for respondents.

FULLERTON, J.—In this action the appellant sought to recover from the respondents the value of certain mining stock placed in the respondents' possession for sale, and for which it is alleged they did not properly account. The complaint contained two causes of action. On the first cause of action, the court instructed a verdict for the respondents, and on the second, the jury returned a verdict in their favor. This appeal pertains to the first cause of action.

The respondents are brokers doing business in the city of Spokane, a part of their business being to buy and sell on commission for others, stocks on the Spokane stock exchange. On August 22, 1917, the appellant delivered to the respondents certificates for fifteen thousand shares of the stock of Copper King Mining & Smelting Company, which he desired to sell, and which the respondents agreed to attempt to sell on the exchange on the morning of that day. The appellant limited the terms of the sale to cash at a minimum price of fifteen cents per share. The appellant and a representative of the respondents together attended the stock exchange on the morning of the day named, where the representative sold a large block of the stock, some eleven thousand of which shares were sold for cash. The parties then returned to the offices of the respondents, when the representative told the appellant that he had sold one thousand shares of his stock at a price of fifteen and a quarter cents a share. A settlement was made on this basis in which the appellant was paid for the one thousand shares. The

remainder of the stock was left with the respondents. On the next day, the appellant came back to the respondents' offices, at which time they purchased from him three thousand shares at eleven cents a share, paying him in cash therefor. Still later the remaining eleven thousand shares were turned over to him.

The appellant brought this action on the theory that all of his shares of stock had been sold on the exchange at a minimum price of not less than fifteen cents a share; that the respondents had misrepresented the facts to him, and, because of such misrepresentations, he was induced to accept payment for the one thousand shares reported as sold, and was induced to accept a less price than fifteen cents a share for the three thousand shares subsequently sold to the respondents. Concerning the return of the eleven thousand shares, he alleged that he accepted it under an express agreement with the respondents that it was to be credited on his demand at its then market price, which he alleges to be five and one-half cents a share.

The appellant's testimony, as we read it, did not measure up to the allegations of his complaint. Nowhere did he testify that the respondents sold on the exchange, on the morning of the sale, as much as fifteen thousand shares of stock for cash, nor did he testify that the eleven thousand shares, admittedly so sold at that time, brought as much as fifteen cents a share. He did testify, however, that, on the morning after the sale, he found a purchaser for the stock at eleven cents a share and went to the respondents' offices and demanded it; that they refused to deliver it to him, giving as a reason for the refusal that they had delivered it to make good sales they had made on the account of another, who had authorized them to sell stock of the company on his behalf; testifying further that, because of the refusal to deliver, he had lost

Oct. 1919]

Opinion Per FULLERTON, J.

the sale. He also testified concerning the transactions at the time the stock was returned to him substantially as he had alleged the facts to be in his complaint. There was testimony also to the effect that, on the day return of the stock was demanded, stock was sold on the exchange at prices ranging from fourteen cents down to eleven cents a share.

At the conclusion of the evidence, the appellant asked leave of the court to make a trial amendment to his complaint so as to make it conform to these proofs. The court at first denied the motion, the trial judge saying:

"If there was a showing of market value of the stock on the day it is claimed to have been demanded and refused, I should feel that you ought to have a trial amendment, and have the case go to the jury, but without such proofs I cannot see that there is anything that makes it material."

Later, on the further insistence of the appellant's counsel, the amendment was allowed; the court, however, adhering to his conclusion that there was no evidence of market value of the stock on the day of the alleged demand.

In the light of the record, we think the court was in error in taking the case from the jury. It was, perhaps, within the court's discretion to allow or disallow a trial amendment; but after it was allowed, the appellant was entitled to the benefit of the proofs which supported his complaint as amended. These tended to show a conversion of the stock by the respondents on a day certain, giving the appellant a right to recover from them its market value on that day. His subsequent acceptance of stock might have been a waiver of his right to recover had the acceptance been unconditional, but the acceptance was not unconditional if the appellant's testimony is to be believed. His testi-

mony is that he took it at an agreed price, less than its value at the time it was wrongfully withheld from him, with the agreement that the price should be credited on its value at that time.

On the question which the court held to be controlling, we think he was likewise in error. While offers to purchase property on the part of a prospective purchaser are generally held inadmissible on the question of the value of the property, the rule is to the contrary as to actual sales.

“The price for which an article is bought and sold constitutes its market value, and is ordinarily the best and most satisfactory standard by which to estimate the amount at which the same or similar articles are to be appraised in the assessment of damages.” 10 R. C. L. 955.

The judgment is reversed as to the first cause of action stated in the complaint, and the cause remanded with instructions to grant a new trial thereon.

HOLCOMB, C. J., MOUNT, PARKER, and BRIDGES, JJ., concur.

Oct. 1919]

Statement of Case.

[No. 15322. Department Two. October 22, 1919.]

JAMES STRANG, *Respondent*, v. EMIL PERSON *et al.*,
Appellants.¹

PLEADING (72, 147)—JUDGMENT ON PLEADINGS—ADMISSION. Under Rem. Code, § 278, providing for judgment on the pleadings on plaintiff's failure to reply, read in connection with other parts of the practice act allowing amendments, relief from defaults, and for trial on the merits when justice demands it, a reply admitting the mutual rescission of an executory contract for the sale of lands does not conclusively presume an obligation to return the purchase price so as to entitle defendant to judgment on the pleadings.

VENDOR AND PURCHASER (43, 44, 159)—MUTUAL AGREEMENT—REPAYMENT OF PRICE. A mere mutual rescission does not conclusively presume an agreement to return the purchase price, as a contract is implied and the return may have been waived.

PLEADING (72, 149)—REPLY—ADMISSIONS—JUDGMENT ON PLEADINGS. Where defendant set up a mutual rescission of an executory contract for the sale of lands, a reply admitting that the contract was "rescinded and forfeited" and denying that defendant was damaged, is not such an unqualified admission of the facts as to entitle plaintiff to judgment on the pleadings, after a trial on the merits, in view of the power of the court to relieve from defaults or consider the pleading amended to conform to proofs.

PLEADING (104, 121)—AMENDMENTS—TO CONFORM TO PROOF—REPLY. Where a trial on the merits was entered into and proceeded without objection to the form of a reply containing an admission, upon oral objection at the trial, the court could consider it amended to conform to proofs, and did so in effect by overruling a motion for judgment and determining the case on the merits.

APPEAL (267)—RECORD—EVIDENCE—NECESSITY—ALLOWANCE OF AMENDMENTS TO PLEADINGS. In the absence of the evidence in the record, error or abuse of discretion in treating the pleadings amended to conform to the proofs cannot be reviewed.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 18, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

¹Reported in 185 Pac. 944.

F. E. Langford, Lucius G. Nash, and P. C. Shine,
for appellants.

John Salisbury, for respondent.

FULLERTON, J.—The respondent brought this action against the appellants to recover upon certain promissory notes, and to foreclose a chattel mortgage given to secure the same. The complaint was in the form usual in such cases. The appellants, in their answer, did not question the allegations concerning the execution of the notes and mortgage, nor the allegation of nonpayment of the obligation represented thereby, but defended by way of counterclaim. These defenses were two in number, pleaded separately. In the paragraph numbered one of the first of these, it was alleged that, coincident with the execution of the notes and mortgages sued upon, and as a part of the same transaction, the respondent and the appellants entered into a conditional sale contract, wherein the respondent agreed to sell, and the appellants agreed to buy, certain real property for a consideration of \$4,000; \$800 of which was paid on the execution of the contract, and the balance agreed to be paid in yearly installments of \$800 each, with interest at seven per cent per annum on the deferred payments. In paragraph two it was alleged that, on a date prior to the commencement of the foreclosure action, the respondent and appellants “mutually rescinded and annulled the said contract of purchase,” and that the appellants, at the instance and request of the respondent, “surrendered possession of said lands and said written contract for the purchase of such lands” to the respondent, who has since had possession and control of the same. It was further alleged that the respondent then and there refused, and still refuses, to repay to the appellants the amount paid by them on the purchase of the land, although

Oct. 1919]

Opinion Per FULLERTON, J.

often requested so to do, to their damage in the sum of \$800, with interest from the date of the rescission.

In the second affirmative defense, the appellants, in the first paragraph thereof, repeated paragraph one of their first defense. In the subsequent paragraphs, they alleged that they were induced to enter into the contract because of false and fraudulent representations made by the respondent concerning the condition of the land and the water supply available for irrigating the same; that, relying upon such false and fraudulent representations, they had planted the land to crops, which failed to mature for want of water, whereby they had been damaged in loss of labor and in loss of the crops in the sum of \$500. In their prayer they asked to recover the sum of \$500 suffered as damages; and the sum of \$800 paid on the purchase price of the land, with lawful interest thereon, less the amount due on the promissory notes sued upon by the plaintiff.

To the answer, the respondent replied in the following language:

“Comes now the above named plaintiff and replying to defendants’ purported first affirmative defense and cross-complaint and the allegations therein set forth as contained in their answer, allege and deny as follows, to wit: Plaintiff admits the execution of the contract as alleged in paragraph one of said first purported affirmative defense, but deny that the said contract was any part of the mortgage sued upon in plaintiff’s complaint, as alleged in said paragraph; Plaintiff admits that the said contract was rescinded and forfeited, and forfeited as alleged, in paragraph 2, of said first affirmative defense and counterclaim, and admits that plaintiff refused to refund the said \$800, but deny that such refusal was to the damage of defendant in any sum whatever.

“Replying to defendants’ purported second affirmative defense and counterclaim, plaintiff admits the allegation in paragraph one, of said purported affirmative

been mislaid. She seemed surprised that the deed was still in existence."

This testimony was admitted over the objection of appellant and constitutes the principal assignment of error on the appeal. We think the testimony was admissible. It is perfectly clear the controversy here hinges upon the question of the delivery of the deed—the final act without which all other formalities are ineffectual to the transfer by deed of the title to land. True, the delivery of a deed need not be directly or immediately to the grantee, but it must pass beyond the control of the grantor, which of itself is a question of intention to be determined as a fact by a consideration of all the surrounding circumstances. The rule suggested by appellant and found in 1 Devlin on Deeds (3d ed.), § 281a: "The grantor's acts and declarations made or done in his own interest several months subsequently to his delivery of the deed are not admissible in evidence as showing his intent in delivering the deed," is not applicable here, because, at the time the grantor made the declarations referred to in the testimony complained of, she had already sold and delivered possession of the land to another, and hence had no self-interest to subserve by those declarations. Again, it is contended that declarations of the grantor, made after parting with his title and in disparagement of it, are inadmissible when made in the absence of the grantee. But the rule assumes the very thing in dispute here, namely, delivery of the deed, which is essential to the transfer of the title. Both reason and authority are to the effect that, if the intention of the grantor in delivering a deed is doubtful or equivocal, evidence of subsequent acts of the grantor is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to a third person. *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W.

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defense; but denies the allegations set forth in paragraphs No. 2, 3, 4, 5 and 6, of said purported third affirmative defense and counterclaim.

“Wherefore, having fully replied to defendants purported counterclaims and cross-complaint, plaintiff prays judgment as prayed for in his said complaint.”

On the issues thus framed, a trial was entered upon, in which, according to the recitals made in the findings of fact of the court, testimony in support of their respective allegations was introduced by each of the parties. While the trial was in progress, the appellants moved orally, and, at the conclusion of the evidence, obtained leave of court and filed a written motion for judgment on the pleadings; the motion as filed reciting that it was based upon the respondent's complaint, the appellants' first defense, and the respondent's reply thereto, “and the records and pleadings on file in this action.” On the same day an order was filed denying the motion. The court thereupon made findings of fact, in which it found the facts concerning the making of the notes and the execution of the mortgage in accordance with the allegations of the complaint. On the appellants' first affirmative defense, it found that the contract therein set forth had been forfeited and not mutually rescinded, and did not form the basis for a counterclaim; and on the second, that it did not constitute a legal defense to the complaint. Conclusions of law were made corresponding with the findings, and based on these, a decree was entered dismissing the affirmative defenses, the first with prejudice, and the second without prejudice, and allowing the respondent to recover in accordance with the allegations of his complaint.

In their notice of appeal the appellants recite that they appeal from the order of the court denying their motion for judgment on the pleadings, and from the

Oct. 1919]

Opinion Per FULLERTON, J.

final judgment entered in the cause. The appeal is before us on the clerk's transcript of the record, the evidence not having been preserved or brought here for review.

The sole assignment of error is on the ruling of the court denying their motion for judgment on the pleadings. The appellants contend that the reply of the respondent to the affirmative matter in their first affirmative answer admitted a mutual rescission of the contract of sale set forth therein, and contend further that, because of such mutual rescission, they are entitled to a repayment of the money paid by them upon the contract. From these premises the conclusion is drawn that they were entitled to offset the sum paid against the amounts due on the notes sued upon by the respondent, and since this sum is larger than the amount so due, are entitled to a judgment for the difference.

The statute (Rem. Code, § 278), provides that, if the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings; and we have held that, where an executory contract for the sale of land is mutually rescinded and nothing further appears, there is an implied obligation on the part of the one receiving money under such a contract to repay it to the person from whom it was received. *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; *Jones v. Grove*, 76 Wash. 19, 135 Pac. 488; *Jackson v. White*, 104 Wash. 643, 177 Pac. 667; *Connelly v. Malloy*, 106 Wash. 464, 180 Pac. 469.

But the statute is not so far imperative as to admit of no exceptions or no relief from the situation defined, nor does a mutual rescission of a contract, such

as the one in contemplation, always imperatively imply an obligation to repay. The language of the statute is limited in terms to a case where there is a default on the part of the plaintiff, although it is probable that a formal admission of new matter constituting a defense would, under our practice, permit of the remedy of a motion for judgment on the pleadings. But, however this may be, the statute must be read in connection with other statutes relating to the practice. We have statutes allowing amendments to pleadings, and statutes permitting the trial court to relieve from defaults; statutes intended to secure a trial on the merits when justice demands it, notwithstanding a party may have placed himself in a position where, under the strict rules of practice, the other party can move for the summary remedy. Nor does the mutual rescission of an executory contract to purchase lands conclusively presume an obligation to return the purchase price paid. A mutual rescission implies a contract between the parties, and it can be a part of such a contract that the party making the payments waives its return in consideration of being relieved from the other obligations of the contract. In case of a waiver, no one would contend that there could be a recovery. The rule, therefore, applies only in those cases where there is a mutual rescission and nothing more, not where the parties have agreed, or where the circumstances of the rescission imply an agreement, that there shall be no return. So, in the case before us, if it be conceded that there was such a default as the statute contemplates, it was within the power of the court to relieve from that default, and if there was an admission in the pleadings of a mutual rescission of the contract without more, it was within the power of the court to relieve from such admission.

Oct. 1919]

Opinion Per FULLERTON, J.

Since, therefore, the rules for which the appellants contend are not imperatively applicable in all instances, the query remains, are they applicable to the record in the present case. We think they are not. The respondent was not in default for want of a reply, nor does the reply interposed unqualifiedly admit the allegations of the answer. Seemingly the pleader did not clearly appreciate the distinction between a rescission and a forfeiture of a contract, and the admission is that the contract was "rescinded and forfeited, and forfeited as alleged" in the answer, treating the terms rescission and forfeiture as if they were synonymous. While this is followed by an admission that the sum paid on the contract price of the land had not been returned, this is followed in turn by a denial of the allegations in the answer to the effect that the failure to make such return resulted in damage to the appellants. It seems plain to us, therefore, that the reply was not such an unqualified admission of the facts as must be made to sustain the appellants' contention, and that we could not so hold did nothing more appear in the record.

But the record shows much more than this. It shows that the appellants entered upon the trial of the cause without objecting to the sufficiency of the reply, and offered evidence at the trial as if the particular question was a question at issue between the parties, making their objection to the sufficiency of the reply, first, orally, while the trial was proceeding, and formally, in writing, after it had been concluded. Since the trial court has power to relieve from defaults and power to grant trial amendments, it had the right at that time to exercise these powers, and to treat the pleadings as amended to correspond with the issues suggested by the facts. This it, in effect, did when it overruled the

motion and determined the cause as the merits appeared to it from the evidence of the parties.

The question whether the facts shown justified the court's conclusions is not before us. This could only be determined by a review of the evidence, which, as we have before stated, is not in the record. The evidence is necessary, also, to a review of the question whether there was an abuse of discretion in treating the pleadings as amended; the record, aside from the evidence, showing no such abuse.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MOUNT, and BRIDGES, JJ., concur.

[No. 15360. Department Two. October 22, 1919.]

W. B. ALVERSON *et al.*, Appellants, v. W. A. HOOPER
et al., Respondents.¹

NEW TRIAL (40)—GROUNDS—NEWLY DISCOVERED EVIDENCE. It is not an abuse of discretion to refuse a new trial for newly discovered evidence as to the falsity of testimony given, where it came to the party's knowledge before the close of the trial and was not disclosed or made known until long afterwards; especially where it would only have been cumulative and at best of little weight.

EVIDENCE (102, 105)—DECLARATIONS AS TO BOUNDARIES—HEARSAY—ORAL STATEMENTS. Upon an issue as to a disputed boundary line, evidence of declarations of a former owner are inadmissible, where such owner was living and could have been produced to testify, his statements having been made only a few days before.

ADVERSE POSSESSION (25)—EXTENSION TO FENCES. Although a fence was erected under a mistake of fact as to the true location of the boundary, exclusive possession under claim of right to such fence for seventeen years ripens into title by adverse possession.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered June 27, 1916, upon

¹Reported in 185 Pac. 808.

Oct. 1919]

Opinion Per FULLERTON, J.

findings in favor of the defendants, in an action to establish a boundary line, tried to the court. Affirmed.

Shrauger & Henderson, for appellants.

Thomas Smith, for respondents.

FULLERTON, J.—The appellants began this action under the provisions of § 947 of Rem. Code, seeking to have the court establish the boundary line between lands owned by them and adjoining lands owned by the respondents, averring in their complaint that such boundary line had become obscure, uncertain, and lost by lapse of time, and that the parties could not agree as to the true location of the line. The respondents answered, denying the pertinent allegations of the complaint, and setting up affirmatively the construction of a fence marking the boundary line between the lands, and adverse possession up to the fence for a period longer than the period of the statute of limitations. The trial court found in favor of the respondents on the issue of adverse possession, and entered a decree accordingly.

The findings of fact, conclusions of law and judgment were made and entered on June 26, 1916. On the next day the appellants filed and served a motion for a new trial, one of the grounds of the motion being newly discovered evidence. No showing, however, accompanied the petition disclosing the nature of such evidence, nor was such a showing made within two days after the filing of the motion. No action was taken upon the motion until March 12, 1917, when the appellants appeared in court and moved for an extension of time within which to file affidavits in support of the motion. Accompanying the motion was the affidavit of one Phillips, in which he averred that a witness, testifying at the trial on behalf of the respond-

ents, had stated to him, on the evening of the day the witness gave his testimony, that he, the witness, did not testify truthfully concerning a material matter at issue between the parties to the action. It appears further that Phillips himself testified in the cause after the close of the testimony of the witness mentioned, and that he did not make known, either to the appellants or their attorneys, what the witness had stated to him until long after the conclusion of the trial and the entry of the judgment. The court denied the motion, and its action in so doing constitutes the first error assigned. But whether the court would open up the matter for hearing on a collateral matter of this sort was discretionary with it, reviewable only, if at all, for an abuse of discretion, and we can find no such abuse. The testimony of the witness was not the only testimony in the record supporting the particular fact, and could it have been shown that he had perjured himself, the judgment would not necessarily have been for the other side. Indeed, as we view the record, his testimony on the particular matter was in no manner controlling. His parents were at one time owners of the property now held by the respondents, and were the parties who constructed the fence thought to mark the boundary line. The disputed testimony related to their intent in so doing. This, owing to his immature years at the time, and perhaps other causes, could not have been very clearly within his knowledge, and we do not, and we think the record clearly shows that the trial court did not, give his testimony on this subject any over-amount of credence. Certain of his testimony was, however, material, but as to this he was abundantly corroborated by other witnesses whose truthfulness is not questioned, and were it found that he was untruthful in the particular statement, the falsity maxim would not be controlling. We cannot,

Oct. 1919]

Opinion Per FULLERTON, J.

therefore, conclude that there was an abuse of discretion in denying the motion.

The second contention is that the court erred in refusing to allow a witness for appellants to testify to declarations made by a former owner of the land concerning the location of the boundary line in question. It developed that the person whose declaration was sought to be shown was then living, was within reach of the process of the court, and that the declarations were made only a few days preceding the trial. Plainly under no rule of evidence could such testimony be admitted. The rule admitting the declarations of parties concerning the location of corners and boundaries to land is surrounded by limitations. The declarations must have been made before any controversy arose touching the matter to which it relates; it must have been made by a person shown to have means of knowledge; and the person making the declarations must be shown to be dead, or for some other reason incapable of being summoned and sworn as a witness. No rule permits the proof of a substantive fact by declarations of persons not parties to the record, or parties in privity with parties to the record, when the person himself can be summoned and sworn as a witness.

The appellants cite and rely upon the case of *Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279, as supporting the principle for which they contend. But the case must be read in the light of the subject-matter then under consideration. The record in the case will disclose that the question before the court was not whether the declarations offered and admitted were objectionable because of the conditions surrounding their making, but was whether such declarations were admissible under any circumstances. This general question

the court decided, and the language of the opinion was used with reference to the general question. It was not intended to be said that such declarations were admissible under all circumstances, regardless of the conditions under which they were made, or the status of the person by whom they were made.

The final question is whether the evidence justified the conclusions of the trial court. While the evidence makes it clear that the fence is not on the true boundary line between the lands of the parties, and that it encloses land which a correct line would show is within the description of the appellants' instruments of conveyance, it does show that it was erected more than seventeen years prior to the commencement of the action, and that the respondents and their predecessors in interest have been in the sole and exclusive possession of the land so enclosed since that time, claiming it adversely to the true owners. While the fence was probably erected under a mistake of fact as to the true location of the line, we have repeatedly held, although perhaps it is not the uniform rule, that the fact of mistake does not prevent such possession and claim of ownership ripening into title by adverse possession. *Wissinger v. Reed*, 69 Wash. 684, 125 Pac. 1030.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MOUNT, and BRIDGES, JJ., concur.

Oct. 1919]

Opinion Per MITCHELL, J.

[No. 15203. Department One. October 28, 1919.]

W. R. ABERCROMBIE, *Respondent*, v. W. E. CULLEN *et al.*,
Appellants.¹

CORPORATIONS (57)—STOCK—TRANSFERS—CONTRACTS—ACTIONS. It is no defense to an action for a refund due the buyer of mining stock that, after its purchase, he received more than the purchase price from a third person upon a forfeited option given on the stock, since that was his own affair.

MINES AND MINERALS (17, 19-1)—CONTRACTS—SALE AND DEVELOPMENT. Upon an issue as to the terms of a contract for the development and sale of mining claims, which defendants claim left plaintiff indebted to them, held that conflicting evidence preponderates in favor of the plaintiff, in view of the fact of defendants' borrowing money from and making a payment to plaintiff at the time of plaintiff's alleged indebtedness to them.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 2, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Lee & Kimball, for appellants.

Davies & Adams, for respondent.

MITCHELL, J.—Plaintiff sued on two causes of action. The first was on a promissory note in the sum of two thousand dollars, made and delivered by defendant W. E. Cullen to plaintiff. The second was on a written contract between plaintiff and W. E. Cullen, whereby plaintiff, in consideration of six thousand two hundred and fifty dollars paid by him, purchased sixty thousand shares of the capital stock of a mining corporation of Montana, in which Cullen was interested, upon the promise of Cullen that later on he would repay plaintiff one thousand seven hundred and fifty dollars. Only one thousand five hundred dollars hav-

¹Reported in 185 Pac. 595.

ing been repaid, the action was for the recovery of the remaining two hundred and fifty dollars. Defendants, by way of answer, say the note was given solely for the accommodation of plaintiff, to be used as collateral in procuring money to be used by plaintiff in the development of mining properties in Oregon; and that the promise to pay the two hundred and fifty dollars, pleaded in the second cause of action, was purely gratuitous on the part of defendants, who received no benefits whatever therefrom. Further answering, defendants set up three counterclaims, which were traversed by a reply. There was a trial to the court without a jury, resulting in a judgment in favor of plaintiff, from which defendants appealed.

As to the second cause of action, appellants, in their brief, say that, after respondent purchased the sixty thousand shares of mining stock, six thousand five hundred dollars was paid to him by a third party for an option thereon at a purchase price of forty thousand dollars, that the option was not exercised and the six thousand five hundred dollars were forfeited to respondent, which is in excess of the amount he paid for the stock, which he still owns. Respondent's dealings with his own property as he saw fit in no way relieved appellants. If he had received all of the forty thousand dollars from the third party to whom he gave the option, it was his affair, and still he could collect from appellants what they, for a good consideration, had promised to pay.

The complaint in this cause was served on July 3, 1916. Thereafter, and about January 26, 1917, appellants paid respondent five hundred dollars which he indorsed as a credit upon the two thousand dollar note sued on. Later, in the amended and supplemental answer, which was served and filed on December 3, 1917, it was alleged, as an affirmative defense and

Oct. 1919]

Opinion Per MITCHELL, J.

counterclaim, that the five hundred dollars was paid upon the representation of respondent it would be received for the purpose of an extension of time for the settlement of all the business affairs between the parties and accounted for in such settlement, but that respondent had refused and neglected to make any settlement and had thus fraudulently obtained the five hundred dollars. On the contrary, respondent replied the five hundred dollar payment was made for no such purpose, but only as a credit on the two thousand dollar note. Upon this issue the trial court found for the respondent, and we are satisfied the finding was correct.

The only remaining point of controversy between the parties in this court—and it is the principal one in the whole case—arises out of the fourth affirmative answer and counterclaim, which is denied by respondent. Appellants alleged that, at the solicitation of respondent, who was the owner of a group of mines in Oregon, appellants agreed to continue the development of the mines to a specified state, with the understanding that the cost, if above six thousand dollars, was to be borne equally, and when the work was completed respondent was to convey to appellants an undivided one-half interest in the mines; that, pursuant to the agreement, appellants completed the work at an expense of seventeen thousand dollars and demanded of respondent a settlement and a deed of conveyance, both of which were refused. On the other hand, respondent contends a written offer by him to the effect the appellants, at their own expense, were to prosecute the work to a specified state of development, when, should the ore body warrant it, appellants, at their own expense, were to patent the mining claim in consideration of a deed to an undivided one-half interest, was the only offer ever made or consented to in any

manner by him and the one under which appellants made all their expenditures, at the close of which they abandoned the enterprise and sold or removed all the supplies, material and equipment as their own; that appellants have never completed the work according to the offer of respondent, who is in no way obligated to them. It is apparent this is but an issue of fact, with the burden of proof upon the appellants. The evidence is voluminous and difficult of reasonable reduction with clearness. The consideration of it satisfies us it more strongly supports respondent's contention. We notice two things especially tending to confirm such view: First, the five hundred dollar payment made on the note six months after the action was brought, erroneously claimed in the answer nearly a year later to have been paid in connection with the alleged partnership mining account, the condition of which at that time, according to appellants' present claim, should have suggested a payment from the respondent; second, the circumstance of appellants' borrowing two thousand dollars from respondent, for which the note in suit was given on November 22, 1915, which as shown by the evidence was to be used, and was used, by appellants, not respondent, in the development of the mines at a time when, as the proof shows, appellants' expenditures, together with the two thousand dollars borrowed, amounted to about one thousand dollars in excess of the six thousand dollar limit of separate liability claimed, and was thereafter followed by the further investment of ten thousand dollars without any call whatever upon the respondent to contribute.

Being satisfied the findings and judgment of the court are correct, the judgment is affirmed.

HOLCOMB, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

Oct. 1919]

Opinion Per MOUNT, J.

[No. 15251. Department Two. October 28, 1919.]

ISABEL HOLTER, *Appellant*, v. CHRISTIAN J. HOLTER,
Respondent.¹

DIVORCE (75)—ALIMONY—SUPPORT OF CHILDREN—POWER TO MODIFY. The court has power to modify a decree of divorce awarding the wife the exclusive use of all the property for fifteen years for the support of herself and minor children, upon its appearing that the children had become self-supporting and the necessity no longer existed.

SAME (86)—DECREE—ENFORCEMENT—CONTEMPT. Failure to obey an order modifying a decree of divorce subjects the party to a judgment for contempt, where the court had jurisdiction and the order was unappealed from.

Appeal from an order of the superior court for Klickitat county, Darch, J., entered July 8, 1918, adjudging the plaintiff to be in contempt of court and sentencing her to imprisonment. Affirmed.

J. D. Akins, for appellant.

E. C. Ward and *McMaster, Hall & Drowley*, for respondent.

MOUNT, J.—This appeal is from an order of the superior court of Klickitat county, adjudging the appellant in contempt for refusing to obey an order of the court in a divorce proceeding and sentencing her to imprisonment for a period of ten days.

The facts are as follows: On the 26th day of February, 1908, the superior court of Klickitat county entered a decree divorcing plaintiff from her husband. In that decree the court found that there were nine children of the marriage, seven of whom at the date of the decree were minors; that all the property of the parties was community property consisting of real estate and personal property; that the real estate

¹Reported in 185 Pac. 598.

was of the value of four thousand five hundred dollars, and the personal property of the value of eight hundred dollars; that there was a mortgage indebtedness of two thousand seven hundred dollars. The court also found:

“That the plaintiff [Mrs. Holter] is a suitable person to have the care, custody and control of said minors, and that the expense of the maintenance and education of said minor children and the support of the plaintiff will be such that the plaintiff should have the entire personal property, and all the rents, issues, and profits of the real estate for such purpose, and that the same should be awarded to the plaintiff, and the plaintiff should be put in possession of the same, and the defendant should be enjoined from interfering with the possession of the plaintiff, or from molesting the plaintiff in her possession of the same, or in the control and custody of said children.

“That the defendant is of the age of about 50 years, and that some provision should be made towards his maintenance in old age, in case the property is sufficient to satisfy the indebtedness and maintain the said minor children and plaintiff.”

The court thereupon entered a decree awarding to plaintiff an undivided two-thirds interest in the real estate. The decree then recites:

“The said plaintiff, Isabel Holter, is further awarded and granted the exclusive possession and right to the use of the whole of said property for the period of fifteen years from and after the date hereof, with the exclusive right to all of the rents, issues and profits therefrom, and the right to cut and remove the whole or any part of the timber thereon, and to sell or otherwise dispose of the same, for her own use and benefit. And the said defendant is hereby restrained and enjoined from trespassing upon or in any way interfering with the possession of the plaintiff in and to said real property during said term of fifteen years.

“That at the expiration of the period of fifteen years from the date of this decree, if the said defendant

Oct. 1919]

Opinion Per MOUNT, J.

shall obey the mandate of the court made herein, and if then living, the defendant shall be entitled to and shall receive an undivided one-third interest and title in and to all said real estate, otherwise the whole of said real property shall vest in the said plaintiff, if living, and in case of her decease prior to said time, then in the said children of plaintiff and defendant, in equal shares."

Thereafter, on July 8, 1915, the defendant in the divorce action filed a petition for a modification of the decree, setting out, among other things, that the children had then all become of age, except four; that the property had largely increased in value; that petitioner had been compelled to earn his livelihood by manual labor and had no other property than his one-third interest in the real estate; that Mrs. Holter was in good circumstances and would be able to permit him to take his one-third of said real estate without depriving her of income necessary for her support and the support of her children. This petition came on to be heard upon the 30th day of July, 1917; and the court, on the 12th day of October, 1917, made findings to the effect that, at that time, there were only three minor children, being then of the ages of thirteen, sixteen and twenty years; that the eldest of these was supporting himself, and the next eldest was more than able to earn his own livelihood. The court also found that the real estate was worth upwards of eight thousand dollars; that the petitioner was in ill health and unable to do manual labor, the only kind of which he was capable; and

"That it is no longer necessary that the plaintiff have the use of the defendant's one-third interest in said real estate in order to support herself or said children, but that the other property of the plaintiff is ample and sufficient for the support of the plaintiff and said minor children."

The court thereupon made an order modifying the original decree and awarding to the petitioner one-third of the crop raised upon his undivided one-third interest in the real estate, permitting the possession of the real estate to remain in the plaintiff, and requiring her to deliver one-ninth of the crop produced upon the premises to the defendant. Thereafter the plaintiff refused to comply with this order of the court, and a citation was issued commanding her to show cause why she should not be punished for contempt for not complying with the modified decree entered on the 12th day of October, 1917. Upon a hearing upon this show cause order, the court found that the plaintiff in the divorce action (the appellant here) wilfully refused to abide by such order and was in contempt of court, and sentenced her to a term of ten days in the county jail. She has appealed from that order.

Appellant's position upon this appeal is that the trial court had no jurisdiction to modify the original decree in the divorce action, and that the order of modification was therefore void, and that the appellant was not in contempt for failing to obey a void order. There can be no doubt that, if the court was without power to modify the decree of divorce, the order of modification was void, and she may not be punished for contempt for failing to comply with that order. *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535.

The only remaining question in the case is whether the court granting the divorce had power afterwards to modify the decree in reference to the disposition of the property. In the case of *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F 721, this court was called upon to determine in what instances decrees of divorce might be modified. In that case, after a painstaking examination of the authorities, Judge Webster, speaking for the court, said:

Oct. 1919]

Opinion Per MOUNT, J.

"Upon careful analysis, the cases seem naturally to arrange themselves into six well defined and distinct classes, each class being based upon sound fundamental principles and the rule pertaining to it being the result of clear logic. These classifications are as follows:

"I. Where the decree in the main action is one granting a divorce *a mensa et thoro*, . . .

"II. The second class includes the cases where the alimony awarded is temporary or *pendente lite*, as distinguished from permanent.

"III. This class includes cases where there are minor children of the parties to the divorce action,

"IV. Comprising this class are the cases where the court, by express provision in its decree, reserves to itself either all or a portion of its power to provide alimony for the wife or maintenance for the children. . . .

"V. In this division are included the cases where, by statute in the particular jurisdiction, power is expressly conferred upon the court to, from time to time, on the petition of either of the parties, revise or alter its judgment or decree respecting the amount of alimony or maintenance. . . .

"VI. In this class fall all of the cases not included in the foregoing classification, viz., cases where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute in the particular jurisdiction expressly, or by necessary implication, conferring upon the court the authority to modify or alter its decrees in respect to alimony for the support of the wife."

We are satisfied that the case at bar falls within the third class, because of the minor children of the parties to the divorce action. In the *Ruge* case, in referring to this class of cases, we said:

"As it seems to us, the true basis upon which the power to modify the decree in these cases rests is that out of the marital relation springs a new relationship,

viz., that of parent and child. Palpably neither executive edict, enactment of legislature, nor decree of court can change the relationship existing between parent and child. The courts may decree that the marital tie shall be absolutely severed and the parties be placed, so far as the law is concerned, in the same situation that they occupied prior to the solemnization of the marriage ceremony; but they cannot alter or modify the fact that a father is the parent of his offspring. This parental relationship, springing as it does from the relationship of marriage, is to this extent incident to the marital status. But the duty of the father, if he has means with which to do so, to support his infant children springs immediately from the parental relationship. As this relationship, incidental as it is to the marriage state, continues to exist after the status out of which it arose has been terminated, either naturally, as by death, or artificially, as by divorce, the duty incident to that continuing relationship still exists. The right of the wife to alimony arises immediately out of the marriage contract, but the right of the child to support at the hands of its parents springs from the incidental relationship which had its origin in marriage, to wit, that of parent and child. The court, therefore, acting upon this relationship as one of the things brought to it by the divorce action, has the power to modify or alter its decree so long as there are minor children under the protection of the court."

At the time of the original decree, there were seven minor children, ranging from four years to nineteen years of age. The trial court at that time concluded that the wife was the proper person to have the care, custody and control of all these minor children, and that it was necessary for her to have exclusive use of all the community property for her support and for their support and maintenance; for the court, in that case, found:

"That the expense of the maintenance and education of said minor children and the support of the plaintiff

Oct. 1919]

Opinion Per MOUNT, J.

will be such that the plaintiff should have the entire personal property, and all the rents, issues, and profits of the real estate for such purpose, . . .”

So it is apparent from the decree in the original case that the possession and use of all the property was awarded to the appellant for the benefit of herself and her minor children. Under the rule in the *Ruge* case, *supra*, we think it is plain that the court had power to control the use of this property for these minor children. We also think it is plain that, if the husband had prospered after the divorce and the property awarded to the wife was insufficient to properly care for her minor children, the court, without doubt, would have power to require the father to furnish additional support for the minor children. It follows, we think, if the court had that power, it also had power, when it was shown that the use of the property was no longer necessary for the support of the divorced wife and her minor children, to decrease the award given in the original decree. In short, if the court had power to increase the award, and in that way modify the original decree, it certainly had power to decrease the award when it was shown that the whole property was no longer necessary for the support of appellant and her minor children. It follows, therefore, that the trial court had jurisdiction to modify the decree. The judgment modifying the decree was not appealed from. It therefore became binding on both parties, and when the appellant refused to abide by it she subjected herself to the penalty which follows contempt.

The judgment appealed from must therefore be affirmed.

HOLCOMB, C. J., BRIDGES, PARKER, and FULLERTON, JJ., concur.

[No. 15333. Department One. October 28, 1919.]

S. C. WHITE, *Executor etc., Appellant*, v.
VIVIAN CHELLEW *et al., Respondents*.¹

DEEDS (15)—DELIVERY—DEED TO PROPERTY DEVISED—EFFECT. To be valid, a deed by a testator to a devisee must have been delivered in his lifetime; and passes title to the estate at the date of delivery, leaving nothing for the will to operate upon.

WILLS (70-1)—CONSTRUCTION—CONDITIONS—FORFEITURE THROUGH CONTEST. Where title to land devised had passed under a deed to the devisee, delivered during the testator's lifetime, it would not be forfeited by the grantee's contest of the will, under the forfeiture clause in the will in case of contests by beneficiaries.

ESTOPPEL (33)—GROUNDS—INCONSISTENT CLAIM IN PRIOR LITIGATION. Where, on a contested claim, the executor asserted that the claim was satisfied by a deed to the claimant, who was also the devisee, and that title passed by the deed rather than by the will, the executor is estopped, in a subsequent will contest by the devisee, from asserting that title passed by the will rather than the deed and that the devise was forfeited by the will contest, under the forfeiture clause in the will.

JUDGMENT (222)—CONCLUSIVENESS—BAR—MATTERS ACTUALLY LITIGATED. A judgment on a contested claim against an estate that the claim had been satisfied by a deed of property also devised to claimant, is *res judicata* in a subsequent will contest, and conclusive that the deed was delivered and that the title passed to the devisee at the time of the delivery of the deed, rather than by the will at the date of testator's death.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered February 3, 1919, upon overruling a demurrer to the answer, dismissing an action for equitable relief. Affirmed.

W. W. Langhorne, for appellant.

O. J. Albers, for respondents.

MAIN, J.—The plaintiff by this action seeks a judgment decreeing that he is the owner of an undivided interest in certain real estate in Lewis county. In the answer of the defendants two affirmative defenses were

¹Reported in 185 Pac. 619.

Oct. 1919]

Opinion Per MAIN, J.

pleaded, to the first of which the plaintiff replied. To the second he demurred. The demurrer being overruled, he elected to stand thereon and refused to plead further. Thereupon a judgment was entered dismissing the action, from which the appeal is prosecuted.

To an understanding of the question presented, it is necessary to summarize the facts stated in the complaint, as well as the facts of the second affirmative defense.

The facts in the complaint are these: Samuel Chellew died in Lewis county on the 9th day of September, 1916, having prior to his death made and published his last will and testament, a copy of which is made a part of the complaint. On the 13th day of December, 1916, the will was duly admitted to probate. By the terms of the will, S. C. White, the plaintiff in this action, was appointed executor, and he is now the qualified and acting executor of the estate.

At the time of his death, the testator left surviving him, as his only heirs at law, a sister, Kate Smith, and a brother, Vivian Chellew. On the 12th day of December, 1917, Kate Smith and Vivian Chellew filed a petition in the superior court for Lewis county for the cancellation of the will, alleging mental incapacity and undue influence. On the 14th day of April, 1918, and while this contest was still pending, Kate Smith died and her brother, Vivian Chellew, was appointed administrator of her estate. On August 21, 1918, Vivian Chellew, in his own right and as administrator of the estate of Kate Smith, moved the dismissal of the will contest. On December 10, 1918, an order was entered dismissing that proceeding.

The third clause of the will provides:

"I give and bequeath unto Mrs. Kate Smith, my sister, the land upon which she now lives, a deed to her having been made by me to her."

Another clause in the will was the following:

"I further direct, that any legatee contesting or attempting to contest this my last will and testament be cut off and shall receive and be entitled to one dollar only."

By this action the plaintiff seeks to have it decreed that a thirteen-twentieths (13-20) interest in the land referred to in the third clause of the will as having been devised to Mrs. Kate Smith has been forfeited by reason of the proceeding to contest the will, in which she participated during her lifetime, and which action, subsequent to her death, was dismissed upon the petition in which the administrator of her estate joined as a party.

The facts stated in the second affirmative defense are substantially these: Vivian Chellew, one of the defendants, was the duly appointed, qualified and acting administrator of the estate of Kate Smith, deceased. Vivian Chellew, as administrator of his sister's estate, filed a claim with S. C. White, as executor of the will of Samuel Chellew, claiming that the latter's estate owed to the former the sum of \$700, which it was claimed was due on a written instrument signed by Samuel Chellew during his lifetime. This claim was rejected and an action was brought upon it. In this action S. C. White, as executor, filed an answer setting up that the \$700 was cancelled by the conveyance from Samuel Chellew to Kate Smith, as set forth in the defendant's first affirmative defense. The deed here mentioned is the same deed that was referred to in the third clause of the will above quoted. By this deed the property in controversy was conveyed by Samuel Chellew, for and in consideration of the sum of \$700, to Kate Smith.

After the issues were framed in the action upon the claim for \$700 against the estate of Samuel Chellew,

Oct. 1919]

Opinion Per MAIN, J.

the cause in due time came on for trial, and resulted in findings of fact, conclusions of law and judgment in favor of the defendant. In that action it was found that the execution of the deed was in satisfaction of the \$700 upon which the action on the claim was based, and for the purpose of carrying out the will. By the second affirmative defense in this action, it was sought to plead a former adjudication. In other words, that, in the action on the claim, upon the issues there made, it was determined that the property in controversy passed by virtue of the deed, for a consideration named, and that the deed was further given for the purpose of fulfilling an intention declared in the will.

The controlling question here is whether the appellant is estopped now to assert a forfeiture by reason of the action to contest the will, because he appeared in the action on the claim and asserted that the property in controversy passed by the deed, for the consideration named therein. Whether the appellant is estopped by the action on the claim from now raising the question which he seeks to have determined in this action depends upon whether the facts which he there relied upon are inconsistent with his present position. *Munson v. Baldwin*, 93 Wash. 36, 159 Pac. 1070. By his position in the former action, he necessarily asserted that the title to the property passed by the deed rather than by the will, and that the conveyance was for a named consideration. This position was sustained upon the trial of the action, and the claim upon which it was based held to be satisfied by reason of the conveyance. If the title passed by the deed and not by the will, it would seem necessarily to follow that it was not now subject to be forfeited because of a violation of the terms of the will relative to a contest thereof.

The deed speaks from the date of its delivery, the will from the date of the death of the testator. There must have been a delivery of the deed during the lifetime of the grantor in order to sustain its validity. As already pointed out, the validity of the deed was sustained in the action which is pleaded as *res judicata*. The deed, being delivered during the lifetime of the grantor, would pass an estate from the date of its delivery; consequently the will, which would be subsequent in time, could not operate upon the same property covered by the deed. *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. 43; *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316.

In the case last cited, where the situation was similar to that of the present case, it was said:

"If the deed had been sustained, Zimmerman would have held title under it and not under the will. Clearly he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed, he would then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee-simple. If it had effectively conveyed a fee, then it would have divested the grantor's whole interest in the property, and having been executed prior to the will, there would have been no estate left in the grantor for the will to operate upon."

The position of the appellant in this case with reference to the deed and his position with reference thereto in the action upon the claim are not consistent. There, to sustain his defense, he asserted the validity of the deed. If the deed were valid, title passed upon its delivery. In this action the appellant asserts rights in the property under the will. He could not consistently, in one action, take the position that the deed was valid and that the property passed thereby,

Oct. 1919]

Opinion Per BRIDGES, J.

and, in another, that the devolution of the property was controlled by the terms of the will.

The judgment will be affirmed.

FULLERTON, TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15364. Department Two. October 28, 1919.]

O. C. OLSEN, *Appellant*, v. WILLIAM H. HAGAN *et al.*,
as Executors etc., Respondents.¹

JUDGMENT (222, 231)—CONCLUSIVENESS—MATTERS LITIGATED—INFERENCES AS TO INTEREST. A decision on a former appeal, directing judgment upon a claim against an estate in a specified sum, followed by the denial of a petition to direct the remittitur to specify the date from which interest should run, is a direct adjudication and *res adjudicata* to the effect that interest is to run from the date of the judgment only.

Appeal from a judgment of the superior court for Spokane county, Huneké, J., entered March 11, 1919, upon remittitur from the supreme court, in an action to enforce a claim against an estate. Affirmed.

F. E. Langford and *Lucius G. Nash*, for appellant.
Peacock & Ludden, for respondents.

BRIDGES, J.—During 1916, the appellant presented a claim in excess of sixteen thousand dollars to the executors of the last will of Marion C. Wharton. This claim was rejected and appellant sued thereon; and after trial on the merits, the court dismissed the case. From that judgment, appellant appealed to this court, where the judgment of the lower court was reversed and it was directed that judgment in the sum of ten

¹Reported in 185 Pac. 578.

thousand dollars be entered in favor of appellant. *Olsen v. Hagan*, 102 Wash. 321, 172 Pac. 1173. The concluding paragraph of that opinion was as follows: "The judgment of the trial court will be reversed, with instructions to render judgment in favor of appellant in the sum of \$10,000." Before the remittitur was sent down, the appellant petitioned this court for an order directing its clerk to set out in the remittitur to be sent down the date from which interest should be calculated. This motion or petition was briefed by the counsel of the respective parties, and later this court made an order denying the motion or petition. After the remittitur had been sent down, the trial court entered judgment in favor of the appellant for ten thousand dollars, with interest from May the 9th, 1918, which was the date of the judgment of this court. The same appellant again appeals to this court, on the ground that the trial court should have entered judgment allowing interest on the ten thousand dollars from the date of the original presentation of the claim to the executors.

The briefs undertake to argue quite extensively the merits of the question as to whether interest should be allowed, and, if so, from what date; but we do not find it necessary to discuss this question. It is perfectly plain to us that the question which the appellant now raises was decided by this court in the previous appeal. If the appellant had not in that case, by motion or petition, sought to have the court pass expressly on the question of interest, the original opinion of the court directing judgment in the sum of ten thousand dollars would have been *res judicata* of the question of interest. *German-American State Bank v. Sullivan*, 50 Wash. 42, 96 Pac. 522.

If such would have been the effect of the original judgment, certainly the denying of the appellant's mo-

Oct. 1919]

Syllabus.

tion to fix the time from which interest should run must be considered as a direct adjudication upon this point. *Taake v. Seattle*, 18 Wash. 178, 51 Pac. 362; *Marble Savings Bank v. Williams*, 23 Wash. 766, 63 Pac. 511; *State v. Boyce*, 25 Wash. 422, 65 Pac. 763.

We hold that this court, in the other appeal, expressly decided the question involved here, and that the judgment must be affirmed.

HOLCOMB, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 15371. Department Two. October 28, 1919.]

ALLIS-CHALMERS MANUFACTURING COMPANY, *Appellant*,
v. THE CITY OF ELLENSBURG, *Respondent*.¹

SALES (177, 178) — CONDITIONAL SALES — OPERATION AS TO THIRD PERSONS — TRANSFER OF TITLE. The reserved title of the vendor of machinery under a conditional sales contract is not affected by the fact that it was knowingly purchased by a contractor to be installed in a municipal power plant; especially where the contract did not authorize the vendee to dispose of the property to the city, but expressly reserved title until fully paid for "whatever may be the mode of its attachment to realty or otherwise."

SAME (176, 178) — CONDITIONAL SALES — RECORDING — ACTUAL NOTICE. Constructive notice by recording a conditional sales contract is not essential to protect the vendor's title, where the city had actual notice, prior to installation, that the machinery for a power plant was sold to the contractor under a conditional sales contract reserving title in the vendor, and that the purchase price was not paid.

SALES (180, 183) — CONDITIONAL SALES — ELECTION OF REMEDIES BY SELLER — AGAINST THIRD PERSONS. Where machinery was conditionally sold by plaintiff to a contractor to be installed in a municipal power plant, a complaint primarily seeking recovery of the machinery after it was installed, but alleging that the city agreed and assumed to pay the balance due, and in the prayer presenting an alternative for the recovery of the balance due upon the purchase price, does not show an election on the part of plaintiff to waive title to the machinery and sue for the price.

¹Reported in 185 Pac. 811.

Opinion Per PARKER, J.

[108 Wash.

MUNICIPAL CORPORATIONS (565) — CLAIMS — PRESENTATION. The filing of a claim against a city is not a condition precedent to action the gist of which was to recover machinery conditionally sold to a contractor and installed in a city power plant, notwithstanding an alternative prayer in the complaint offering to take judgment against the city for the balance due on the purchase price, which it is alleged the city assumed and agreed to pay.

SALES (177) — CONDITIONAL SALES — TITLE OF VENDOR — ATTACHING PROPERTY TO REAL ESTATE. The title to machinery conditionally sold to be installed in a municipal power plant does not pass to the city on attaching the machinery so as to become part of the real estate, contrary to the express terms of the conditional sales contract.

MUNICIPAL CORPORATIONS (181) — SALES (183) — REMEDIES ON CONTRACTOR'S BONDS — MATERIALMEN UNDER CONDITIONAL SALES CONTRACT. The vendor in a conditional sales contract of machinery sold to a contractor for a municipal power plant may pursue the property under the contract, and is not restricted to a remedy by action upon the contractor's bond, under Rem. Code, § 1159, relating to security for laborers and materialmen furnishing supplies for public improvements.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered December 14, 1918, upon sustaining a demurrer to the complaint, dismissing an action of replevin. Reversed.

John H. McDaniels, for appellant.

C. R. Hovey, for respondent.

PARKER, J.—The plaintiff, Allis-Chalmers Manufacturing Company, seeks recovery of certain machinery and equipment which it delivered and agreed to sell under the terms of a conditional sale contract to W. A. Kraner & Company, and which was used in the equipment of the electric power plant of the defendant city under a contract between the city and Kraner & Company for the enlargement of the plant. The plaintiff's complaint was demurred to by the defendant upon the ground that it does not state facts constituting a cause of action. The demurrer was sustained by the superior court, and the plaintiff electing to stand upon its

Oct. 1919]

Opinion Per PARKER, J.

complaint and not pleading further, judgment of dismissal was rendered against it. From this disposition of the cause, the plaintiff has appealed to this court.

The controlling facts as alleged in the complaint may be summarized as follows: In June, 1915, the respondent city was contemplating the enlargement of its electric power plant, and then entered into negotiations with Kraner & Company looking to the entering into a construction and equipment contract to that end with that company. Thereafter, on June 26, 1915, Kraner & Company, anticipating the entering into a formal construction and equipment contract with the city, entered into a conditional sale contract with the appellant, under which appellant delivered and agreed to sell to Kraner & Company the machinery and equipment here involved, the agreed purchase price being \$15,597, to be paid in installments, all of which were to be paid within ninety days after the delivery of the machinery and equipment to Kraner & Company and acceptance thereof by that company. The sale contract contained, among other conditions, the following:

“The title and right of possession to the machinery herein specified remains in the Company (Allis-Chalmers Manufacturing Company) until all payments hereunder (including deferred payments and any notes or renewals thereof, if any) shall have been fully made in cash, and it is agreed that the said machinery shall remain the personal property of the company whatever may be the mode of its attachment to realty or otherwise, until fully paid for in cash. Upon failure to make payments, or any of them, as herein specified, the company may retain any and all partial payments which have been made, as liquidated damages, and shall be entitled to take immediate possession of said property, and be free to enter the premises where said machinery may be located, and to remove the same as its property . . .”

"On or about the 4th day of October, 1915, the said W. A. Kraner & Co. entered into a contract with the city of Ellensburg, for the improvement, enlargement and extension of the power plant owned and operated by said city as aforesaid, which contract was and is in writing and specified, among other things, for the installation in said plant of machinery of the type, character and description so sold by the plaintiff to the said W. A. Kraner & Co."

Thereafter the machinery and equipment was by appellant shipped to W. A. Kraner & Company at Ellensburg, and was received and accepted by that company.

"In or about the month of July or the month of August, 1916, the defendant city of Ellensburg, conceiving that said Kraner & Co. had abandoned said work, or would not complete it, itself took over, assumed and undertook the completion of the buildings and work that Kraner & Co. had so contracted to do; and it, the said city, proceeded to complete said work, and installed in said power plant and buildings such of said machinery that plaintiff had so delivered and agreed to sell to said Kraner & Co. as had not already been installed therein. And the said city still retains all of said machinery and refuses to return the same to the plaintiff, although the purchase price therefor has not been paid; and said defendant city also refuses to pay the unpaid balance of the purchase price of and for the said machinery or any part thereof. . . . No part of the said purchase price of said machinery has been paid except the sum of \$13,263, and there is due, unpaid and owing to the plaintiff on account of said purchase price of said machinery the sum of \$2,334, with interest thereon at the rate of six per cent per annum from and after May 22, 1916. . . . The defendant city, at all the times herein mentioned, had notice and knowledge of the relations existing between the plaintiff and said W. A. Kraner & Co., as hereinabove alleged, and the state of their account, and the terms of the contract whereby plaintiff had agreed to sell and deliver said machinery, and that the purchase price thereof had not been paid, and that the

Oct. 1919]

Opinion Per PARKER, J.

title to, and ownership of, said property was in and remained with the plaintiff until the purchase price thereof had been fully paid. And particularly the plaintiff, by letter written on its behalf by its general attorney, duly posted, mailed and addressed to the city clerk of said city, on the 5th day of October, 1915, and received by the said city clerk on or about October 8, 1915, and by him read and communicated to the mayor and council, notified and stated to said defendant, city of Ellensburg, as follows: 'I presume that you understand, but if not, we wish to bring formally to your notice as city clerk the fact that our contract with W. A. Kraner & Co. is a conditional sale contract in which the title and right of possession to the machinery therein specified is retained by Allis-Chalmers Manufacturing Company, until all payments thereunder have been fully made in cash.'"

The complaint concludes:

"By reason of the premises the defendant, city of Ellensburg, assumed and agreed to pay to the plaintiff the unpaid purchase price of said machinery or to return the same to plaintiff, and plaintiff has a lien upon and against said machinery for the said unpaid balance of the purchase price, with interest thereon. Wherefore plaintiff demands judgment: That it have and recover of and from the defendant, city of Ellensburg, the sum of \$2,334, with interest thereon at the rate of six per cent per annum from and after May 22, 1916, or for the recovery of said personal property and machinery, or for such other and further relief as may be just and equitable;"

If this were a conditional sale of property other than for the purpose—as counsel for the city assumes, and as we shall assume for argument's sake—of its being placed in the city's plant, there would seem to be but little room for arguing that the conditional sale contract should not be given full force and effect and the title to the machinery and equipment held to remain in appellant until full payment of the agreed

purchase price. The principal contention made by counsel for the city in support of the judgment, and apparently the principal ground upon which the trial court rested its judgment, seems to be that, because of this purpose on the part of appellant and Kraner & Company, appellant lost all right to reclaim the machinery and equipment when it was, by Kraner & Company and the city, placed in the city's plant in compliance with the construction and equipment contract. In support of this contention, counsel for the city invoke the general rule as quoted in *Peasley v. Noble*, 17 Idaho 686, 107 Pac. 402, 134 Am St. 270, 27 L. R. A. (N. S.) 211, from *New Haven Wire Co. Cases*, 57 Conn. 352 (*Baring v. Galpin*, 18 Atl. 266), 5 L. R. A. 300, as follows:

"The effect of a conditional sale and delivery of the property to the vendee with power to sell it as the property of the vendor and deliver the proceeds to him, is that, upon a sale by the vendee of the property, it ceases to be security to the vendor and the purchaser acquires a good title, and if the vendee does not pay to the vendor, but retains the proceeds of the sale and uses them, the vendee becomes a debtor to the vendor therefor, and the latter has no priority over other creditors."

We do not think this rule is applicable to the facts of this case. This conditional sale contract does not in terms vest in Kraner & Company any power to sell or transfer the title of appellant to the machinery and equipment to the city. The contracts involved in those cases did contain such power of disposition by the vendee of the vendor's title. Nor do we think that this conditional sale contract inferentially vests such power in Kraner & Company to dispose of appellant's reserved title to the machinery and equipment, but that it clearly negatives any such thought; for it not only makes express reservation of title to the equip-

Oct. 1919]

Opinion Per PARKER, J.

ment and machinery in appellant until the purchase price therefor is fully paid, but also provides, "that the said machinery shall remain the personal property of the company whatever may be the mode of its attachment to realty or otherwise, until fully paid for in cash." The equipment and machinery being sold for the purpose of going into the city's plant, this language of the contract manifestly has reference to the possibility of its becoming so attached to the city's plant that it might become a part of the realty under ordinary circumstances, and is, we think, in effect, an express provision that, even under such circumstances, the title shall still remain in appellant until the full purchase price is paid; and, as we have seen, the city had actual notice of the existence of the conditional sale contract and the conditions thereof before any of the equipment or machinery went into its plant.

Some contention is made that the conditional sale contract should be held void as to the city because it was not recorded as provided by Rem. Code, § 3670; but, as we have seen, the city, according to the allegations of the complaint, had actual notice of the existence of the conditional sale contract and the conditions thereof. We think that such actual notice was effectual in protecting the title to the machinery and equipment in appellant, regardless of record notice. *State v. Brummett*, 98 Wash. 182, 167 Pac. 120; 35 Cyc. 351. Whether or not a mere constructive record notice would have protected appellant's title under these circumstances, we need not here decide. The decision in *Allis-Chalmers Co. v. City of Atlantic*, 164 Iowa 8, 144 N. W. 346, Ann. Cas. 1916D 910, 52 L. R. A. (N. S.) 561, is of interest in this connection.

Contention is also made that the allegations of the complaint, especially the concluding one above quoted, and the prayer of the complaint, evidence an election

to waive title to the machinery and equipment on the part of the appellant and seek to recover from the city the balance due upon the purchase price of the conditional sale contract. It is true that the concluding allegation of the complaint may, when read apart from the other allegations, seem to indicate that appellant is attempting in effect to foreclose a claimed lien upon the machinery and equipment; and in the prayer of the complaint it might be said that there is an alternative prayer for recovery of the personal property after a prayer for a money judgment. We think, however, that, reading the complaint as a whole, it is apparent that appellant is seeking to recover primarily the machinery and equipment upon the theory that it possesses title thereto because of the failure in payment of the full purchase price thereof under the conditional sale contract, and that, instead of the recovery of the property being the alternative for the recovery of the balance due upon the purchase price, the recovery of the purchase price is voluntarily submitted by appellant as an alternative for the recovery of the property. In other words, appellant is simply offering to do equity, rather than claim the property freed from all claims of the city, as under the terms of the conditional sale contract it had the right to do. We think this is not a seeking of the recovery of money from the city, but rather a seeking to recover the property, accompanied with an offer to permit the city to keep the property if it will pay the balance due upon the purchase price. We are of the opinion that the allegations of the complaint do not show an election on the part of appellant to waive title to the machinery and equipment and sue for the purchase price, as in the case of *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71, relied upon by counsel for the city.

Oct. 1919]

Opinion Per PARKER, J.

Contention is also made that the complaint fails to state a cause of action because it fails to allege the filing of a claim for the balance due on the purchase price with the city, in compliance with Rem. Code, § 7998, such filing of a claim being a prerequisite to the suing of a city of the class to which Ellensburg belongs, where a money judgment is sought against such city upon certain classes of claims. The answer to this contention is found, we think, in what we have already said touching appellant's claim of title to the machinery and equipment. Plainly it was unnecessary to file a claim under § 7998 in order to maintain an action to recover the machinery and equipment; and that, we think, is the gist of appellant's cause of action.

Some contention is made upon the theory that the machinery and equipment has become attached to, and thereby became a part of, real property belonging to the city. We do not find in the complaint any allegations warranting any such conclusion of fact; but, even so, as already noticed, by the expressed terms of the conditional sale contract, appellant's title to the machinery and equipment would still be preserved, even though it had become attached to the realty so that, under ordinary circumstances, it would become a part thereof.

Some contention is made in behalf of the city that, since the machinery and equipment was sold by appellant to Kraner & Company for the purpose of placing it in the city's plant, appellant is limited in its remedy to an action upon the bond required of contractors under Rem. Code, § 1159, relating to security for laborers and materialmen furnishing labor or material for public works; or to an action against the city seeking a money judgment only, in case the city has neglected to require such bond from Kraner & Company, the contractor, as provided by Rem. Code, § 1160. No authorities are

cited supporting this contention. We are of the opinion that appellant had the right to enter into the conditional sale contract, retaining title in its machinery and equipment as it did, and that such contract is as valid and binding against the city, it having actual notice thereof before receiving any of the machinery and equipment, as if the city were a private individual, to whose contracts Rem. Code, §§ 1159 and 1160, have no application.

We are quite convinced that the facts as alleged in the complaint state a cause of action in favor of appellant against the city. The order of the trial court sustaining the city's demurrer to the complaint, and the judgment of dismissal rendered thereon upon appellant's election to stand upon the allegations of its complaint, are reversed, and the cause remanded to the superior court for such further proceedings as may not be inconsistent with the views herein expressed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MOUNT, JJ., concur.

Nov. 1919]

Opinion Per MAIN, J.

[No. 14935. *En Banc*. November 12, 1919.]

RASHER-KINGMAN-HERRIN COMPANY, *Respondent*, v.
POSTAL TELEGRAPH-CABLE COMPANY, *Appellant*.¹

COMMERCE (1)—REGULATION—POWERS OF STATE—EXCLUSION BY FEDERAL CONTROL—TELEGRAPH COMPANIES. Congress, by 36 U. S. St. at Large, p. 539 (U. S. Comp. St. 1913, §§ 8581, 8583), making telegraph companies common carriers and applying the interstate commerce act to them, has occupied the entire field and taken complete control of telegraph companies to the exclusion of state laws, which are superseded.

TELEGRAPH AND TELEPHONS (9)—MESSAGES—LIABILITY FOR MISTAKES. Under U. S. Comp. St. 1913, §§ 8581, 8583, authorizing telegraph companies to classify messages into repeated and unrepeated messages and to charge different rates for the same, a company would not be liable for a mistake in an unrepeated message, stipulated on the back of the telegraph blank to have been sent without liability for mistake, if the charges were just and reasonable, regardless of state laws.

COURTS (38)—RULE OF DECISION—FEDERAL QUESTIONS. The construction of the interstate commerce act as it relates to telegraph companies is primarily a Federal question, upon which the decisions of the United States supreme court are controlling.

HOLCOMB, C. J., and TOLMAN, J., dissent.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 4, 1918, upon findings in favor of the plaintiff, in an action for damages, tried to the court. Reversed.

Horace Kimball, W. C. Donovan, and George H. Armistage, for appellant.

Burcham & Blair, for respondent.

Grinstead & Laube, *amicus curiae*.

MAIN, J.—The purpose of this action was to recover damages which resulted from a mistake in the transmission of an unrepeated night lettergram. The cause was tried to the court without a jury, and resulted in

¹Reported in 185 Pac. 947, 1119.

findings of fact, conclusions of law and a judgment sustaining the plaintiff's right to recover in the sum of six hundred dollars. From this judgment, the defendant appeals.

As the case is controlled by a question of law, the facts will only be briefly stated. The respondent, Rasher-Kingman-Herrin Company, a corporation, was engaged in business in the city of Spokane, this state. One A. W. Taylor was engaged in business at Calgary, Canada. The appellant, the Postal Telegraph-Cable Company, is a corporation engaged in the transmission of telegraphic messages for hire. The respondent, answering an inquiry from Taylor, delivered to the appellant a message which quoted "lemons seven dollars." When this message was delivered to Taylor at Calgary it read, "lemons four dollars." Taylor accepted the offer as stated in the telegram delivered to him, and the lemons, together with other articles, were shipped. When they arrived at Calgary, Taylor refused to take the lemons at a price other than four dollars. The action is to recover the difference between the seven dollars quoted on the lemons in the message delivered at the Spokane office and the four dollars specified in the message when delivered to Taylor at Calgary. In transmitting the message it was first sent to Seattle, and from that office relayed to Vancouver, British Columbia, where it was again relayed to the point of destination. There is some controversy as to whether the error in the transmission was that of the operator at Seattle in placing it on the line or that of the operator at Vancouver, who received it for retransmission. It will be assumed that the error was that of the operator in Seattle in relaying the message from there. The message at Spokane was written upon one of the appellant's blanks which

Nov. 1919]

Opinion Per MAIN, J.

it supplied for that purpose. On the face of this blank appeared the following:

"Send the following night lettergram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to."

One of the conditions written on the back thereof was:

"The Company [the appellant] shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated night lettergram, beyond the amount received for sending the same; . . ."

It is not claimed that the sender of the message did not know of the terms and conditions referred to.

The controlling question is whether Congress, by legislation, has occupied the field covering the transmission of interstate messages and messages to foreign countries. If it has by such legislation so occupied the field, the judgment of the trial court cannot be sustained. The decisive question, therefore, is whether, under the interstate commerce law (24 Stat. 379), as amended by act of Congress of June 18, 1910, c. 309, 36 U. S. Statutes at Large, page 539, state laws regulating the contract obligations and liabilities of common carriers in interstate telegrams, or telegrams to foreign countries, have been superseded and annulled by the provisions of the Federal law. Section 1 of the amended act contains the following:

"The provisions of this act shall apply . . . to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act. . . . All charges

made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into *day, night, repeated, unrepeated, letter, commercial press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.* . . .” [Italics supplied.] U. S. Comp St., § 8563.

The act, as amended (Compiled Statutes, 1913, §§ 8581, 8583), gives to the interstate commerce commission power to determine what rates, regulations or practices are just and reasonable. Under the act an interstate carrier has a right to make regulations such as are just and reasonable governing the conduct of such interstate business. In the excerpt quoted above from the amendment referred to, telegraph companies engaged in sending messages from one state to another, or to any foreign country, are made common carriers, and the interstate commerce act is made to apply thereto. It is expressly provided, that the charges for the transmission of such messages shall be just and reasonable; that messages may be classified into day, night, repeated, unrepeated, and the other classes mentioned; and that different rates may be charged for the different classes of messages.

The question here for decision has been many times before the courts of other jurisdictions, but it is one of first impression in this court. Two of the Federal courts—one district and the other the circuit court of appeals for the eighth circuit—the interstate commerce commission, and the courts of Alabama, Georgia,

Kansas, Maine, Minnesota, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, and Wisconsin have held that, by the act of Congress approved June 18, 1910, telegraph companies, as to their interstate and foreign business, have been placed under the supervision of the interstate commerce commission, and that the act has occupied the entire field and taken complete control of the regulation of telegraph companies to the exclusion of state laws. *Williams v. Western Union Tel. Co.*, 203 Fed. 140; *Gardner v. Western Union Tel. Co.*, 231 Fed. 405; *Unrepeated Message Case*, 44 I. C. C. 670; *Boyce v. Western Union Tel. Co.*, 119 Va. 14, 89 S. E. 106; *Bailey v. Western Union Tel. Co.*, 97 Kan. 619, 156 Pac. 716; *Western Union Tel. Co. v. Bank of Spencer*, 53 Okl. 398, 156 Pac. 1175; *Western Union Tel. Co. v. Schade*, 137 Tenn. 214, 192 S. W. 924; *Western Union Tel. Co. v. Hawkins*, 198 Ala. 682, 73 South. 973; *Hall v. Western Union Tel. Co.*, 108 S. C. 502, 94 S. E. 870; *Western Union Tel. Co. v. Petteway*, 21 Ga. App. 725, 94 S. E. 1032; *O'Neill & Gyles v. Postal Telegraph-Cable Co.*, 201 Ill. App. 37; *Haskell Implement & Seed Co. v. Postal Telegraph-Cable Co.*, 114 Me. 277, 96 Atl. 219; *Dettis v. Western Union Tel. Co.*, 141 Minn. 361, 170 N. W. 334; *Poor Grain Co. v. Western Union Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28; *Meadows v. Postal Tel. & Cable Co.*, 173 N. C. 240, 91 S. E. 1009; *Durre v. Western Union Tel. Co.*, 165 Wis. 190, 161 N. W. 755.

The courts of the states of Texas, Mississippi, Arkansas, and Indiana have taken the opposite view. *Western Union Tel. Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516; *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, 74 South. 779; *Western Union Tel. Co. v. Boegli* (Ind.), 115 N. E. 773; *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273.

The courts last mentioned hold that the amendatory act above referred to relates to rates and the classification of messages, and does not cover the subject of liability for negligence. Under those cases the same liability would exist if mistakes were made in transmission of an unrepeatd as in a repeated message. The courts sustaining the view that the act has occupied the field, point out that, if the same liability exists for a mistake in the transmission of an unrepeatd as in a repeated message, the right to classify and to make different charges for the respective classes would be of little consequence. The supreme court of Massachusetts, in *Western Union Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192, expressed the opinion that, so far as the act manifests a purpose to regulate the field over which Congress has paramount authority, the right of the state to exercise its police power in the same field ceases to exist, "no matter whether the particular act of Congress covers it entirely or not."

The appellant's regulation was specified upon the telegraph blank used, to the effect that there should be no liability for mistakes in the transmission of an unrepeatd message. Under the act of Congress it had the power to classify messages into repeated and unrepeatd, and to make different charges for the same. To sustain a recovery in this case would be equivalent to holding that the regulations of the company made under the act of Congress and its classification of its messages under the act were not effective. The jurisdiction to determine these matters is not in the state courts. It is said, however, that the act of Congress does not fix a rule of liability, and that therefore the state rule should be applied. If the appellant's rules and regulations with reference to the transmission of unrepeatd messages and the charges therefor are just and reasonable, no liability would

exist; hence there would be no occasion for the application of the state law. The question is one which has been so frequently before the courts and so fully discussed that extended discussion here would add nothing to what has already been said. We are of the opinion that not only the great weight of authority but the better reason is with the decisions holding that the act of Congress mentioned has occupied the field, and that state laws, whatever they may be, defining the rule of liability for negligence, cannot be applied.

The judgment will be reversed.

MACKINTOSH, FULLERTON, PARKER, MITCHELL, and MOUNT, JJ., concur.

TOLMAN, J. (dissenting).—The majority opinion is silent upon the question of whether or not appellant, by its stipulation to that effect upon the back of the form used for sending the message, can escape all liability for negligence for its mistakes, delay in transmission or delivery, or nondelivery of an unrepeatable message; but the great weight of authority is to the effect that liability cannot be so avoided. A reasonable limitation of the liability, if contracted for, might be upheld, but a stipulation against all liability (and this is such a stipulation, because to return the unearned fee for sending a correct message is not a payment of any damages sustained) is against public policy and void. Among the authorities which so hold are the following: *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910, Ann. Cas. 1912A 55, 30 L. R. A. (N. S.) 409; *Western Union Tel. Co. v. Anniston Cordage Co.*, 6 Ala. App. 351, 59 South. 757; *Stiles v. Western Union Tel. Co.*, 2 Ariz. 308, 15 Pac. 712; *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Central Union Tel. Co. v.*

Swoveland, 14 Ind. App. 341, 42 N. E. 1035; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 34 N. W. 811, 5 Am. St. 672; *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. 795; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. 609, 34 L. R. A. 492; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707; *Blackwell Milling & Elevator Co. v. Western Union Tel. Co.*, 17 Okl. 376, 89 Pac. 235.

This brings us, then, to what the majority denominates the controlling question in the case, that is: "whether Congress, by legislation, has occupied the field covering the transmission of interstate messages and messages to foreign countries." It may be admitted that the courts are divided upon this question; but feeling, as I do, that the states should maintain their jurisdiction until it appears beyond doubt that Congress has occupied the field, I cannot concur with the majority, nor do I think that the better reasoning is with the majority—quite the contrary. The 1910 amendment, upon the construction of which rests the solution of the question, has never been specifically passed upon by the supreme court of the United States, and yet the decisions of that court clearly indicate that this amendment does not take away from the several states the right to apply their own rules of liability in cases of negligence.

This amendment adds nothing to the original interstate commerce act to show a purpose or intent on the part of Congress to occupy the field exclusively, and its purpose seems to be to include under the operation of the act telegraph and telephone companies not theretofore included, upon practically the same terms as those which affected railroads and other common carriers prior to the amendment of 1906, commonly called the Carmack amendment, and nowhere in the language employed is there anything of the character

of the Carmack amendment which in terms applies only to carriers of goods and does not apply to telegraph companies. In discussing the interstate commerce law and the effect of the Carmack amendment, the supreme court of the United States said, in *Adams Express Co. v. Croninger*, 226 U. S. 491, 44 L. R. A. (N. S.) 257:

“That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

“But it is equally well settled that, until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected: *Smith v. Alabama*, 124 U. S. 465; *New York &c. Railroad v. New York*, 165 U. S. 628; *Chicago, Milwaukee & St. P. Ry. v. Solan*, 169 U. S. 133, 137; *Richmond &c. Ry. v. Patterson Co.*, 169 U. S. 311; *Cleveland &c. Ry. v. Illinois*, 177 U. S. 514; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477. In the *Solan* case, cited above, it was said of such state legislation:

“ ‘They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as

'a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.' "

After discussing the effect of these decisions, made prior to the Carmack amendment, the court again says:

"In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States. . . .

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S. 370; *Southern Railway v. Reid*, 222 U. S. 424; *Mondou v. Railroad*, 223 U. S. 1."

A reading of the 1910 amendment, quoted in the majority opinion, at once discloses that Congress has there covered the subject of rates and charges only, and by no word or set of words has it attempted to legislate upon the subjects of negligence in the transmission or delay of messages, or liability for such negligence. For the position of the supreme court of the United States upon the particular question here involved, we are therefore brought back to the cases of

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, and *Chicago, Milwaukee & St. Paul R. Co. v. Solan*, 169 U. S. 133, based upon the law as it was prior to the Carmack amendment and as the law now is with reference to telegraph and telephone companies, in the former of which it is said:

"In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. . . .

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage? . . .

"The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce in the absence of Congressional action providing a different measure of liability when contracts, such as the one now before us, are made in relation to interstate carriage."

The decisions which hold that the right to classify messages and make different rates for the different classes, which is clearly given by the amendment under discussion, includes also the right to make rules limiting or excluding liability for negligence in the transmission or delay, seem to read something into the act which I am unable to find there, which, under any fair construction of the language used, was not intended by the law-making power. In *Western Union Tel. Co. v. Piper* (Tex. Civ. App.), 191 S. W. 817, it is said:

“In view of what has thus been stated, it can hardly be said to be clear that Congress, by the enactment of the act of 1910, intended to subject telegraph companies to the operation of the wholly inapplicable regulations originally designed for the government of an altogether different character of carrier. The law of 1910, as will be seen by a reference to it, as hereinbefore quoted, and in so far as herein pertinent, merely impresses upon telegraph companies the character of a common carrier; provides that their charges shall be ‘just and reasonable’; declares that unjust and unreasonable charges shall be unlawful; and specially provides that messages may be classified as in the act directed, and that ‘different rates may be charged for the different classes of messages.’ No reference whatever is made to the subject of the contract for the transmission of the message or of the liability for the breach of such contract. Had Congress intended to assume control over these subjects it would seem to have been easy to have so declared, or to have provided appropriate regulations having such effect, as was done in the case of carriers of property. As Mr. Justice Hodges in the opinion in the *Bailey Case*, as printed in the 171 S. W. 842, so pertinently and forcefully says, after reviewing the act of 1910:

“‘It appears from these extracts that the extent to which Congress has gone is merely to declare that telegraph companies shall be considered common carriers, and to require them to make and observe reasonable rates and charges for the services which they per-

form, and to permit them to divide their messages into classes, presumably as a basis for rates. The mere fact that Congress has enacted some legislation on this subject does not, of itself, signify a purpose to monopolize the field and exclude the states entirely. *M. K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 34 Sup. St. 790, 58 L. Ed. 1377, L. R. A. 1915E 942; *Atl. C. L. Ry. Co. v. State of Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312.'"

In *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273, it is said:

"It was clearly the intention of Congress in enacting this statute to confer authority on the commission merely to regulate rates and classification of messages, and not to confer authority to declare the principles of law affecting the liability of a carrier for its wrongful acts or omission. *Western Union Tel. Co. v. Bailey*, *supra*. The classification of repeated and un-repeated messages and the fixing of rates for the different classes of messages is quite a different thing from a contract absolving the carrier from liability for its own negligence. If it had been intended to confer power upon the Interstate Commerce Commission to change the law in that respect by the mere approval of classification of rates, doubtless the framers of the statute would have used different language.

"The stipulation with respect to the telegraph message can not be sustained as a stipulation for value because in the very nature of the case a telegram or the damages which may flow from its breach can not be estimated in advance. *Western Union Tel. Co. v. Compton*, *supra*. Nor can adherence to the common law principle which invalidated such a stipulation be viewed as a burden upon or interference with interstate commerce, or as being in conflict with the authority of the Interstate Commerce Commission over that subject, for, as before stated, the exemption does not come within the scope of the regulation of rates or of classification of messages, but is purely an attempt to

contract against the general law of the land with respect to liability for negligence.”

Indeed, there seems to be no other logical conclusion to be reached, and it is useless to quote from other courts or multiply authorities for what seems to be obvious. The judgment of the trial court was right and should be affirmed.

HOLCOMB, C. J., concurs with TOLMAN, J.

ON PETITION FOR REHEARING.

[*En Banc.* January 19, 1920.]

PER CURIAM.—Since the decision of this case, a petition for rehearing has been filed supported by an *amicus curiae* brief, in which the question decided is again elaborately argued.

Since the opinion in this case was filed, the United States supreme court, on December 8, 1919, in the case of *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 247 U. S. 510, decided the same question, and the holding in that case sustains the view expressed in the majority opinion in this case. The question being the construction of the interstate commerce act as it relates to telegraph companies is primarily a Federal question, and the holding of the Federal supreme court is controlling. It does not appear, therefore, that a further argument and consideration of the question would be useful.

The petition for rehearing will be denied.

Nov. 1919]

Opinion Per FULLERTON, J.

[No. 15212. Department Two. November 19, 1919.]

NATHAN KATZ, *Respondent*, v. ANNA R. JUDD,
Appellant, EDWARD JUDD, *Defendant*.¹

BILLS AND NOTES (7) — CONSIDERATION — POSTPONEMENT OF DEBT. The postponement of an obligation to a future date by the giving of a new note is a new and present consideration for the giving of the note.

SAME (9) — CONSIDERATION — ACCOMMODATION PAPER. The signing of a note as accommodation party, although without receiving consideration, obligates the party on the note.

HUSBAND AND WIFE (29, 74) — SEPARATE DEBTS — CONTRACTS WITH HUSBAND JOINTLY. A note by a husband and wife for an obligation which, before their marriage, was the separate debt of the husband upon which his future wife was an accommodation party, is the separate debt of each and not their community debt; nor was its character changed by the new promise.

SAME (94) — COMMUNITY PROPERTY — JUDGMENT. In an action against husband and wife upon their joint note, which was not a community debt, the judgment should be joint and several against the defendants, but not against the community.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 16, 1918, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Reversed.

Edward Judd, for appellant.

Chas. C. Curtis (*Harry Sigmond*, of counsel), for respondent.

FULLERTON, J.—This is an action upon a promissory note. The defendant Anna R. Judd interposed a defense of want of consideration. Judgment went against her in the court below and she appeals.

In November, 1910, the appellant, then Anna Rasdale, was a stenographer in the law office of Edward Judd. She had theretofore taken title to certain real

¹Reported in 185 Pac. 613.

property which she held as trustee for him. On the day named, Judd borrowed of the respondent, Katz, the sum of \$1,000 and gave a promissory note therefor signed by himself and the appellant. As security for the note, he caused the real property mentioned to be deeded to Katz, taking from him a writing, running to the appellant in her then maiden name, to the effect that he held title to the lands as security for the note. The appellant had no interest in the loan, and it was testified, over the objection of the respondent, that, when she signed the note, she inquired as to the liability she assumed thereby, and that Judd stated to her, in the presence of Katz, that she assumed no liability whatsoever. The note was not paid at maturity, nor was it finally taken up until February 15, 1917. In the meantime one parcel of the land conveyed as security had been lost through a mortgage foreclosure, another had been sold by Katz without the knowledge of Judd, and Judd had made certain payments on the note either in cash or by the performance of legal services. In the meantime, also, Judd and the appellant had intermarried. In the early part of the year 1917, the respondent began pressing Judd for the balance due on the note, and on the day in February named, a settlement of the accounts between the parties was had in which the amounts creditable on the notes were adjusted. The parties also agreed upon the value of the remaining land held by the respondent in trust, and this value was also credited on the note. There then remained due on the obligation the sum of \$900, and for this amount Judd gave a new note payable in installments at future dates. When the settlement was finally reached, the respondent insisted that the appellant execute the new note, which she did at the request of her husband, he telling her, when asked for an explanation, that it "was the old Katz matter."

Nov. 1919]

Opinion Per FULLERTON, J.

It is to recover upon the last note that the present action is prosecuted.

The defendant Edward Judd at no time questioned his liability on the note. It is insisted on his behalf, however, that there was nothing more than a past consideration for the execution of the new promise. As to the appellant, it is insisted, if we have correctly gathered the meaning of her counsel, that she assumed no liability, not even that of an accommodation party, when she executed the original note, and as there was only a past consideration for the execution of the new note on the part of the principal obligor, there was no consideration at all as to her, since a past consideration moving not to her but to the principal on the note will not support a promise on her part to pay.

But whether the conclusion contended for would follow were the premise admitted, we have not found it necessary to inquire, as we cannot conclude that the new note was founded entirely upon a past consideration. The obligation evidenced by the original note was due at the time of the execution of the new note. Edward Judd, at least, was then presently obligated to pay it. The postponement of the obligation to a future date was a new consideration moving to him and operated as a present consideration for the execution of the new note. The new note was accepted only after the appellant had signed it. Conceding that she was not obligated on the original note, she became obligated on the new one by her act of signing as an accommodation party, notwithstanding she personally received no consideration for executing the note. Rem. Code, § 3420; *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328; *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72; *Skagit State Bank v. Moody*, 86 Wash. 286, 150 Pac. 425, L. R. A. 1916A 1215; *Knickerbocker Co. v. Hawkins*, 102 Wash. 582, 173 Pac. 628.

The court, on the facts, not only entered a joint and several judgment against the defendants, but entered a judgment against the community composed of the defendants. While judgment in the first of these forms legally follows from the considerations stated, plainly judgment in the latter form does not. The obligation was not a community obligation of the defendants. In its inception it was the obligation of Edward Judd upon which the appellant was, at most, an accommodation party. The subsequent marriage of the makers did not change its character in this respect, nor was its character changed by reason of the new promise. The obligation is still the obligation of the defendant Edward Judd on which his wife is liable as an accommodation party. As such it is the separate obligation of each, not their community obligation, and the judgment entered is erroneous in so far as it makes the obligation a charge upon community property.

The judgment is reversed, and the cause remanded with instructions to modify it in accordance with this opinion.

HOLCOMB, C. J., MOUNT, and PARKER, JJ., concur.

Nov. 1919]

Opinion Per MAIN, J.

[No. 15597. Department One. November 21, 1919.]

THE STATE OF WASHINGTON, *on the Relation of L. L. Thompson, Attorney General, Plaintiff, v. JOHN H. POWELL et al., as Members of the Veterans' Welfare Commission, Respondents.*¹

STATES (23-1)—FISCAL MANAGEMENT—COLLECTION AND CUSTODY OF FUNDS. Neither Rem. Code, § 5029, requiring state officers authorized to collect or receive state moneys to make daily deposits of the money collected, nor other statutes defining the duties of the state auditor and treasurer, has any application to moneys received by the Veterans' Welfare Commission, created by Laws 1919, p. 33, for the purpose of aiding veterans of the late war and which appropriated \$500,000 for such aid, but the act authorizes the commission to make loans and use the funds and repayments in their discretion for the benefit of soldiers and sailors.

Application filed in the supreme court October 6, 1919, for a writ of mandamus directing the Veterans' Welfare Commission to remit certain funds to the state treasurer. Denied.

The Attorney General and Roscoe R. Fullerton, for relator.

John H. Powell, for respondents.

MAIN, J.—This is an original application in this court for a writ of mandamus. The relator is the *Attorney General* of the state. The respondents are the members of the Veterans' Welfare Commission, created at the legislative session for the year 1919 (Laws of 1919, ch. 9, p. 33).

Section 1 of this act creates what is known as the Veterans' Welfare Commission, to consist of five members, who shall be appointed by the governor. The section further provides that the commission may ex-

¹Reported in 185 Pac. 573.

pend the funds appropriated by the act "as they may deem necessary for such purposes."

Section 2 of the act defines the power of the commission and, among other things, authorizes it to disburse the funds appropriated by the act for the welfare of "veterans and the soldiers, sailors and marines of the United States in the war with Germany." This section also provides that the commission may disburse the funds appropriated for its use in such manner and for such purposes as "in its judgment will best facilitate and promote the return of such veterans, soldiers, sailors and marines to civil life"; and concludes with the provision that the commission may "make grants or loans, or expend such funds in any manner for such persons, and the enumeration of specific purposes shall not be construed to exclude other purposes but the manner in which such funds shall be expended shall be entirely in the discretion of the commission."

Section 4 of the act provides that the records of the commission shall be audited by the bureau of inspection and supervision of public offices.

Section 5 provides that, for carrying out the purpose of the act, there is appropriated the sum of \$500,000.

After the act became effective, the respondents were appointed by the governor as members of the commission and entered upon their duties as such. In the carrying out of the provisions of the act, the commission, from time to time, made loans in small amounts and for a short time to various persons coming within the act, to relieve an immediate necessity. In many cases these loans have been repaid to the commission. The amount of money thus disbursed and repaid to the commission aggregates the sum of \$1,425.14. The relator's position is that this money, having been once loaned by the commission and repaid to it, should be

Nov. 1919]

Opinion Per MAIN, J.

returned to the state treasury. The respondents' position is that they have a right to retain the money and use it for the purposes specified in the act. In support of his position, the relator first relies upon Rem. Code, § 5029, which requires each state officer authorized by law to collect or receive moneys belonging to the state to transmit to the state treasurer all moneys collected by him on the preceding day.

In the Veterans' Welfare Commission act there is no limitation upon the powers of the commission in expending the appropriation, other than it shall be expended for the benefit of soldiers and sailors. It is clear from the provisions of the act that it was not the intention of the legislature to provide for a department of the state government for the collection of revenues of the state. The work of the commission is not a part of the state's fiscal system. The act relied upon by the relator was passed for the purpose of limiting the powers of such officers, bureaus and departments as were created for the purpose of collecting the state's revenue from various sources. The Veterans' Welfare Commission was created for the purpose of spending a portion of the state's revenue, and the legislature was careful to fix no limitation upon the powers of the commission in that respect.

The concluding language of § 2 is that the funds shall be expended entirely "in the discretion of the commission." The other general statutes relied upon by the relator defining the duties of the state treasurer and the state auditor are likewise inapplicable to the present case. To give the act the construction contended for by the relator would tend to limit the object and purposes for which the act was passed. The construction contended for by the respondents would tend to facilitate the accomplishment of those objects and purposes. The commission may loan to a soldier the

sum of \$10 for ten days. The soldier repays that amount. Under the construction of the relator, a portion of the appropriation represented by this \$10 is no longer available for the work of the commission. It has performed all the service that it can perform, and must be returned to the state treasurer, where it would remain until such time as the legislature might re-appropriate it. If this be true in regard to \$10, it would also be true in regard to any sum loaned and repaid. If the money loaned by the commission must be retired when it is repaid to it, the fund might be thus depleted before the work of the commission was accomplished. This construction is not in harmony with the language used in the act, nor with its objects and purposes. There is no reason why money which has been loaned by the commission and returned to it should not again be used for other persons covered by the act, in any manner the commission sees fit.

The writ will be denied.

HOLCOMB, C. J., MITCHELL, MACKINTOSH, and PARKER, JJ., concur.

Nov. 1919]

Opinion Per MOUNT, J.

[No. 15536. Department Two. November 22, 1919.]

*In the Matter of the Estate of MARTHA E. BAYER, an
Incompetent Person.*¹

APPEAL (88)—RIGHT TO APPEAL—PERSONS AGGRIEVED—GUARDIANS. The guardian of an insane person has such a representative interest as to be an "aggrieved" party, entitled, by Rem. Code, § 1716, to appeal from an order discharging him from his trust as guardian.

Motion to dismiss an appeal from an order of the superior court for Lincoln county, Sessions, J., entered May 6, 1919, discharging the guardian of the estate of an insane person. Denied.

Samuel P. Weaver (*S. H. Boyles*, of counsel), for appellant.

Merritt, Lantry & Merritt, for respondent.

MOUNT, J.—This appeal is from an order of the lower court discharging the guardian of the estate of Martha E. Bayer. It appears that, in the year 1916, John Dotson, the brother of Martha E. Bayer, filed a petition to have a guardian appointed for her estate in the state of Washington, for the reason that she was incompetent to manage her own affairs. On a hearing of this petition, the court concluded that she was competent to manage her own affairs and declined to appoint a guardian. The petitioner appealed from that order to this court. Upon the hearing of that appeal, the case was reversed with directions to the lower court to cause letters of guardianship to be issued. *In re Bayer's Estate*, 101 Wash. 694, 172 Pac. 842. Thereafter the lower court appointed D. R. Cole as guardian of the estate of Martha E. Bayer, and letters of guardianship were regularly issued. Thereafter Martha E. Bayer filed a petition alleging that

¹Reported in 185 Pac. 606.

she had fully recovered from any mental disability that might have existed prior to the former hearing, and prayed for the discharge of the guardian of her estate. Citation was issued to the guardian, who, in his representative capacity, contested the petition. Upon that trial the court concluded that she was fully recovered, and entered an order discharging the guardian and requiring him to make a report of his guardianship. The guardian has appealed from that order.

Respondent moves to dismiss the appeal for the reason that the guardian is not an aggrieved party within the meaning of § 1716, Rem. Code. A number of cases are cited to the effect that a guardian of an insane ward has no right to appeal from a decree of the probate court discharging him from his trust as guardian on the ground that his ward is no longer insane. The rule is stated in 3 C. J., page 649, § 512, as follows:

“Where an appeal or other proceeding for review is allowed in proceedings to adjudge one to be of unsound mind and place him under guardianship, or in subsequent proceedings, the general rule that no one can maintain an appeal or other proceeding for review unless he is a party or person aggrieved by the judgment, order, or decree complained of applies. In some jurisdictions he must be a party to the proceeding.”

In 2 R. C. L., page 55, § 35, the rule is stated as follows:

“As a general rule, a guardian has such an interest in a judgment or decree affecting the estate of his ward as entitles him to appeal therefrom. The duties of a guardian *ad litem* duly appointed by a court to defend the interests of an insane ward do not necessarily terminate with the decision of the case in which he was appointed, but he has authority, in a proper case, to appeal the cause to the court of last resort. . . . Though the cases are not in entire accord, it seems to be generally held that where the children of an alleged

Nov. 1919]

Opinion Per MOUNT, J.

incompetent person petition for the appointment of a guardian for such person they have an interest in the proceedings which gives them the right as 'aggrieved' persons to appeal from an order dismissing the petition. But a sister of an alleged incompetent person, whose petition for the appointment of a guardian is denied, is not a person aggrieved within the meaning of a statute regulating the right to appeal, since none of her legal rights are infringed, she having no right to control the custody or conduct of the alleged incompetent, nor right to support from, or duty to care for or support him, and no legal rights in or to his property."

A number of cases are cited by respondent which deny the right of the guardian of an insane ward to appeal from a decree discharging him from his trust as such guardian. Among these are: *State ex rel. Brooking v. Branyan*, 30 Ind. App. 502, 66 N. E. 464; *Ensign v. Faxon*, 224 Mass. 145, 112 N. E. 948; *Matter of Brooks*, 119 App. Div. 780, 104 N. Y. Supp. 670; *McKenna v. McKenna*, 29 R. I. 224, 69 Atl. 844.

But whatever the rule may be in other jurisdictions, we are satisfied that this court has laid down a different rule, to the effect that the guardian of the estate of an insane ward may appeal in a case like this. In *In re Wetmore's Guardianship*, 6 Wash. 271, 33 Pac. 615, where a guardian of the person and estate of Seymour Wetmore had been appointed and had entered upon the discharge of his duties as such guardian, a petition was filed by Mr. Wetmore to vacate and set aside the appointment upon the ground that he was capable of managing his own affairs and was not incompetent or unfit to transact his own business. Upon a hearing of this petition, the court granted the same and discharged the guardian. The guardian appealed from that order. A motion was filed to dismiss the appeal here and this court said:

"Some preliminary questions were presented at the hearing, one of which was a motion to dismiss the appeal on the grounds that said order vacating the order appointing the guardian was a discretionary one, resting wholly within the discretion of the lower court, and was not an order from which an appeal could be taken. But the court, being of the opinion that an appeal would lie therefrom, denied the motion."

That case is in point here, to the effect that the guardian of the estate is authorized to appeal from an order discharging him. In the case of *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, this court said:

"If a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal should the judgment be against him."

For that reason, the motion to dismiss was denied.

When this case was here before upon the appeal of the brother of Mrs. Bayer, we recognized that the petitioner, claiming that his sister was insane and unable to manage her affairs, had a right to appeal. No motion to dismiss appears to have been made in that case and the question was not there considered, but we assumed jurisdiction of the case and decided it upon its merits. We think the real and substantial reason why the appellant may appeal in this case is the fact that he appeals in his representative, and not in his personal, capacity. When the citation was issued upon the petition of respondent that she had recovered her faculties and was able to care for her estate, this citation was directed to the guardian. He was required to show cause why his guardianship should not be terminated. He appeared in his representative capacity and questioned the truth of the allegations of the respondent in her petition. It is true he had no personal interest, but his interest was

Nov. 1919]

Statement of Case.

that of one representing the estate of his guardian, and the interest which he had was an interest in his representative capacity alone. We think there can be no question but that, if his interest was a personal one, he could not appeal; but, it being a representative interest, he was aggrieved in his representative capacity, and therefore has the right of appeal.

We are of the opinion, therefore, that the motion to dismiss should be denied.

HOLCOMB, C. J., MITCHELL, FULLERTON, and TOLMAN, JJ., concur.

[No. 15476. Department One. November 25, 1919.]

CHESTER A. FLANAGAN, *Respondent*, v. AMERICAN
MINERALS PRODUCING COMPANY, *Appellant*.¹

BILLS AND NOTES (136)—CONSIDERATION—EVIDENCE—SUFFICIENCY. On conflicting evidence, a finding of consideration for a note given by a corporation is supported by evidence that it was given to secure a current indebtedness for expenses incurred in the company's interest.

CORPORATIONS (152)—POWERS—ULTRA VIRES ACTS—ESTOPPEL. In an action on promissory notes made by a corporation, the defense of *ultra vires* is not available where the defendant has accepted and enjoyed the benefit of the services and expenses for which the note was given.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 26, 1919, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

O. S. Galbreath, for appellant.

Gordon & Easterday and Wesley Lloyd, for respondent.

¹Reported in 185 Pac. 609.

MACKINTOSH, J.—The suit below was brought upon two promissory notes aggregating the sum of five hundred dollars, of which the appellant corporation was the maker. Judgment was obtained in the superior court of Pierce county in favor of the payee of the notes, Charles G. Flanagan; one Chester A. Flanagan being assignee of the notes for the purposes of collection.

The theory of the defense below, and of the appeal here, is failure of consideration for the promissory instruments. The testimony adduced on behalf of the appellant corporation by certain of its officers was to the effect that the corporation, having an interest in a certain mineral deposit in Vale, Oregon, entered into a contract with Charles G. Flanagan and Martin Jacobson whereby the exclusive selling rights of such mineral were acquired by Flanagan and Jacobson. This exclusive sale contract, the officers of the corporation testify, was later found to be a considerable obstacle in the way of securing further and necessary investments in the corporation, and hence its surrender was solicited by the corporation and obtained, Flanagan and Jacobson accepting the notes in action as a consideration for the cancellation of the contract. In these transactions, it is alleged, Charles G. Flanagan assumed to act for and on behalf of his brother, Chester A. Flanagan, plaintiff below. It later developed, however, that Charles G. Flanagan had no authority to act on behalf of Chester A. Flanagan, and that the appellant corporation was compelled to pay Chester A. Flanagan and Martin Jacobson a valuable consideration for the cancellation of the contract. They allege that Charles G. Flanagan did not in fact cancel the contract nor “tear it up and throw it in the waste basket,” as the officers of the corporation had directed. Hence, the appellant argues, the considera-

tion actually paid to Chester A. Flanagan and Martin Jacobson left the notes previously issued for the supposed first cancellation without the validity of a consideration.

For a further consideration for the cancellation of this exclusive sale contract the payee of the notes, it is alleged, was given twenty-five thousand shares of the capital stock of appellant corporation.

The contention of the payee is that the notes were given to secure a valid and current indebtedness. He alleges that, in an endeavor to finance the corporation and to sell its stock, he expended substantially five hundred dollars of his money; once on a trip to Vale, Oregon, when he paid his own expenses and the expenses of an analytical chemist whom he took with him and whose services were for the benefit of the corporation; that he advanced for the benefit of the corporation sums of money to various persons to the amount of two hundred and forty-five dollars; that he went from Tacoma to Yakima and back on business of the corporation and paid his entire expenses. It was on account of these disbursements principally that he supposed the notes were made to him. He testified that "he never just knew" why the twenty-five thousand shares of stock were issued him.

The trial court found that, of the hundreds of thousands of shares and dollars talked about in connection with the whole transaction, the actual financial precipitate was, as the plaintiff contended, about five hundred dollars, which the court thought was spent, as the plaintiff said, for the benefit of the company. Our examination of the record suggests no reason for disagreeing with the court's finding as to the fact of consideration.

Apart from questioning the fact, appellant contends here that the action of the corporation in making the

notes in suit was *ultra vires* the corporation, and hence the notes were voidable. The fact of *ultra vires* may be conceded. Respondent has not appeared in this appeal, but we feel that it does not require an answering brief to reiterate the familiar doctrine that the defense of *ultra vires* will not prevail, in a case such as this before us, where the defendant has accepted and enjoyed the benefit of its extra-corporate act. *Tootle v. First National Bank*, 6 Wash. 181, 33 Pac. 345; *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55; *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316; *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

[No. 15605. *En Banc*. November 29, 1919.]

R. W. HILL, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS (525)—PUBLIC UTILITIES—BONDS—SALE AT DISCOUNT—POWERS OF CITY—STATUTES. Under Rem. Code, § 800S, authorizing a city to issue and sell bonds bearing interest not exceeding six per cent per annum, special fund utility bonds calling for five per cent interest semi-annually may be sold by the city at a discount that would yield six per cent interest, in the absence of any statute prohibiting sales at less than par.

SAME (525). Such sales at less than par are not prohibited by the latter part of such section, which provides that the contract for the improvement may provide for payment only in bonds and warrants at par.

SAME (525). Sales of five per cent below par so as to net six per cent per annum does not violate Rem. Code, § 800S, providing that the rate of interest shall not exceed six per cent per annum payable semi-annually.

¹Reported in 185 Pac. 631.

Nov. 1919]

Opinion Per MITCHELL, J.

SAME (525). The objection to such a sale that the discount is payable in a lump sum, and violates the statute requiring semi-annual payments, is technical and goes largely to the form of the bonds.

MACKINTOSH, J., dissents.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 4, 1919, upon sustaining a demurrer to the complaint, dismissing an action for an injunction, tried to the court. Affirmed.

Donworth, Todd & Higgins (Hyman Zettler, of counsel), for appellant.

Walter F. Meier and Robert H. Evans, for respondent.

Preston, Thorgrimson & Turner, amici curiae.

The Attorney General, and Frank P. Christensen and R. M. Burgunder, Assistants, amici curiae.

MITCHELL, J. —This is a taxpayer's suit to enjoin the city of Seattle from the consummation of the sale of public utility bonds. Two proposed bond issues are involved; one, according to ordinance No. 39,492, in the sum of \$790,000, to provide for making additions and betterments to the city's street railway system, and the other, according to ordinance No. 39,667, in the sum of \$1,250,000, for making additions and betterments to the light and power plant belonging to the city. Each ordinance provides that the bonds to which it relates shall be issued and sold, and bear interest not exceeding six per cent per annum, payable semi-annually, and that the bonds and interest shall be payable only out of a special fund created from the gross revenues of the public utility. The bonds prepared under the two ordinances are written so as to bear interest at five per cent per annum, payable semi-annually. Carstens & Earles, Incorporated, and John E.

Price & Company, have offered to buy all the bonds thus prepared at a price "equal to six per cent (6%) basis for each one thousand dollar bond, plus accrued interest to date of delivery. Said basis to be figured in accordance with the formula prepared by the state bureau of accountancy." The city council passed a resolution accepting the bid, and thereupon this action was commenced against the city, complaining separately against the sale of the bond issues. To each cause of action a general demurrer was interposed and sustained. Plaintiff, electing to plead no further, has appealed from the judgment dismissing the actions.

The only question presented is whether the city can sell its special fund utility bonds below par where the rate of interest will not exceed six per cent per annum, under a controlling statute which provides the city may "issue and sell bonds bearing interest not exceeding six per cent per annum, payable semi-annually."

The general rule as announced by the cases and text writers is well stated in the case of *Kiernan v. City of Portland*, 61 Ore. 398, 122 Pac. 764, as follows:

"The weight of authority is to the effect that the sale of municipal bonds below par is not illegal, unless the act or ordinance authorizing the issue expressly directs that they shall not be sold for less than par. 'That the bonds of a municipal corporation may be sold by it for less than par must be regarded as the general understanding of lawmakers of the states, as well as the officers of the municipalities, because, when it is desired to prevent such sale, that fact is incorporated in the enabling act or in the ordinance or resolution providing for the issue of the bonds.' *Simonton, Municipal Bonds*, § 146. See, also *Yesler v. Seattle*, 1 Wash. 308 (25 Pac. 1014); *City of Lynchburg v. Slaughter*, 75 Va. 57; *City of Memphis v. Bethel* (Tenn.), 17 S. W. 191; *City of Austin v. Nalle*, 85 Tex. 520 (22 S. W. 668, 960)."

Nov. 1919]

Opinion Per MITCHELL, J.

The rule as announced in that case was quoted with approval and adopted by this court in *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580; and in the case of *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, it was said:

“In the absence of a controlling statute, it has been generally held that a municipality can sell its bonds below par, and that a sale at par allowing a commission for the sale does not affect the validity of the bonds.”

Therefore, under the rule, it is advisable to consider the ordinance, the statute, and some of the cases of this court in this respect. Neither of the ordinances in question provides that the bonds shall not be sold at less than par. The first session of the legislature of this state enacted a law (Laws of 1889-1890, pp. 520-522) authorizing cities and towns to construct certain kinds of internal improvements, including waterworks and sewer systems, and issue bonds in payment therefor, creating a general indebtedness against the city therefor. Section 3 of the act provided the bonds should bear interest not exceeding six per cent per annum, payable semiannually. Under that law, the city of Seattle proceeded to acquire and construct a water system and a sewer system. The necessary ordinance was passed and adopted by a popular vote. The ordinance fixed the rate of interest on the bonds at five per cent per annum, and provided they should be disposed of at not less than par, although the statute was silent as to whether or not they might be sold for less than par. The bonds were offered, but no bids were received. Later, a private offer was made to buy the bonds if it were arranged that the rate of interest should be five and one-third per cent per annum on the money actually paid in the purchase of the bonds at a discount, the result of which would be

that the city at the end of the maturity of the bonds (twenty years), would have paid \$62,000 in addition to the specified five per cent interest. The city passed an ordinance accepting the proposition and was proposing to dispose of the bonds. The case of *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014, was instituted to prevent the sale, one of the principal contentions and objections being that the proposed sale contemplated disposing of the bonds at less than par. This court, however, sustained the transaction, holding that, without again submitting the matter to the voters, the city council might, by ordinance, provide that the bonds be sold at a discount, and bear a greater rate of interest than that nominated in the bonds, provided the same did not exceed six per cent per annum, payable semi-annually, upon the amount of money received; basing the decision upon the general rule and the broad language contained in § 6 of the act, viz.: "such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town."

The legislature of 1897, chap. 112, page 326, also the session of 1909, chap. 150, page 580, departing from the prior authorized plan by which the cost of internal municipal improvements should be a general charge against the municipality, authorized cities and towns, in the alternative, to make the cost of the same a charge against only a special fund created from the revenues or proceeds to be derived from the utility or system. In the present instance the city of Seattle is pursuing this new or alternative plan, and finds its primary authority in §§ 8005, 8006, 8007 and 8008, Rem. Code. Immediately, we are concerned with portions of § 8008. This section authorizes the sale of bonds and warrants "bearing interest not exceeding six per centum per annum, payable semi-annually,"

Nov. 1919]

Opinion Per MITCHELL, J.

and also provides that: "Said bonds and warrants shall be sold in such manner as the corporate authorities shall deem for the best interests of the city or town, and the corporate authorities may provide in any contract for the construction and acquirement of the proposed improvement that payment therefor shall be made only in such bonds and warrants at par value thereof." The statute contains no direct prohibition against the sale of bonds at less than par, but it is urged that the latter part of the above quoted portion of § 8008, by implication at least, negatives any authority for the sale of bonds at less than par. Clearly, such is not the case; for the limitation placed upon the broad power to sell as the corporate authorities shall deem for the best interests of the city is confined to contracts for the construction and acquirement of the proposed improvement. Here the city is not dealing with a contract to construct or acquire the proposed improvement, but with the sale of bonds to produce cash so that the city may enter into a contract or contracts for the construction and acquirement of the proposed improvements.

In the whole of the establishment and construction of a public utility, it often becomes necessary to go beyond the reach of contracts and acquire property by proceedings in eminent domain, in which case, while the property owner might be compelled to accept a warrant of the municipal corporation in pay for his property, if there was sufficient money in the fund on which it was drawn with which to pay it, certainly he could not be compelled to take a municipal bond for his compensation. He is entitled to cash or its exact equivalent. A statute which either does or does not prohibit the sale of bonds at less than par, while not without its influence, does not fix the value of the

bonds. Values are fixed by the market; they are the result of bargain and sale. So that the limitation referred to is restricted and confined. Beyond its sphere it does no violence to the general rule concerning the sale of bonds at less than par, but must be taken as an exception to it, and, by a familiar rule of construction, proves the existence of that from which it is excepted. The words of the limitation, considering the connection in which they are used, besides binding the city authorities if they follow the plan of paying the contractor in bonds or warrants, are designed to advise competitive bidders for the contract with certainty of the manner in which their services and material must be exchanged for such bonds or warrants.

Counsel for appellant, and the *Attorney General* of the state and his associates, argue that the general rule laid down in *Yesler v. Seattle*, *supra*, and *Paine v. Port of Seattle*, *supra*, has been modified, if not overruled, in the later cases of *Uhler v. Olympia*, *supra*, and *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825. We are satisfied such is not the case. Similar propositions were involved in the two latter cases which were entirely different from those in the two first cases, which were similar to the present case.

In the case of *Uhler v. Olympia*, the bonds to be sold were to bear interest at the rate of six per centum per annum, so that any sale below par would necessarily result in a violation of the statute which made six per centum per annum the maximum rate of interest. In that case it was said that the question of importance was whether the council could legally pay the sum of \$4,500 to the purchasers of the bonds as a commission to cover "the cost of the preparation of the bonds and the legal expenses." The question was resolved in the negative. In doing so, upon referring

Nov. 1919]

Opinion Per MITCHELL, J.

to the statutory maximum interest rate of six per cent per annum, it was said:

“This limitation on the power of the council is just as prohibitive, and if disobeyed would result in the same evil, as if the statute had provided that the bonds should not be sold for less than par. In either case the object of the law is to prevent speculation in municipal securities, and to insure to those who must ultimately pay the bonds, a dollar in lawful currency for every dollar of obligations issued. Any device to defeat these purposes, when declared by statute, has been invariably frowned upon.”

Under the language just quoted, it is to be noticed that it is not stated bonds may not be sold for less than par, but only that disobedience of the provision relating to the maximum rate of interest would result in the same evil “as if the statute provided that the bonds should not be sold for less than par.” Again in the case, the same thing, in effect, is stated as follows:

“There is another reason for holding the transaction illegal. It is usurious. A statute fixing a maximum rate of interest may not be evaded at will by any device or contrivance which will insure a greater return of interest than the law allows.”

This is a rule which is not only sound, but which has no application in such a case as the one at bar, where, by the sale of the bonds as proposed, the city will not pay interest on the money it receives in excess of the maximum rate allowed by law.

The case of *Spear v. Bremerton*, as already stated, was similar to the *Uhler* case. It was one in which the city of Bremerton had made a contract for the sale of bonds to purchase a waterworks system, whereby the purchaser of the bonds agreed to attend to all proceedings necessary in the issuance of the bonds and take them at a discount of five per cent, which

would amount to the sum of \$11,250 on the whole issue, said discount to cover all commissions, attorney's fees and the purchase and sale of bonds; said bonds to draw six per cent. The case was very properly disposed of, taking the same course as did the *Uhler* case. Counsel refer to, and with considerable insistence rely upon, certain language employed in the case, as follows:

(a) "This is clearly an evasion of the law. We had occasion to say, in *Uhler v. Olympia*, *supra*, that the taxpayer could not be put to the burden of paying a purchaser of the bonds anything in the way of commission or bonus or for attorney's fees and expenses of printing, etc. The duty of the city and the privileges of the buyer are there set out, and we shall not restate them. It may be understood that the law will no longer tolerate the exploitation of the public in the way of taking payment for something for which the taxpayer gets no valuable consideration. The bond, when issued in conformity with existing laws, is a commodity or commercial paper, to be bought at its price or to be let alone."

Manifestly the proposition of taking payment for something for which the taxpayer gets no valuable consideration is wholly foreign to a case like the present one in which the city receives money, not services in connection with the preparation and disposition of the bonds, at a rate of interest not in excess of that allowed by law; while but a moment's glance at the other proposition—"The bond, when issued in conformity with existing laws, is a commodity or commercial paper, to be bought at its price or to be let alone"—will discover it is vastly different from declaring that the bond is a commodity or commercial paper to be bought at its par value or to be let alone.

(b) "The statute does not assume to fix a maximum rate of interest and permit the issuance of the

Nov. 1919]

Opinion Per MITCHELL, J.

bonds at a lesser rate, leaving the difference as a zone for exploitation out of which a city council can give the buyer or broker his commissions, attorney's fees and other expenses."

This declaration can have no application to such a case as the one at bar; for here there are no broker's commissions, fees or other expenses to be taken care of in a zone created by the difference between the statutory maximum rate of interest and the lesser rate fixed in the bonds. It is essential to a full appreciation of the proper effect of any decision of a court to keep in mind the facts of the case under consideration therein. The facts in the *Uhler* and *Spear* cases were unlike the facts in the present case. In fact, in the *Uhler* case it was specifically stated:

"It is contended by counsel for the city that this is a valid exercise of power under *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014, and *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580. We find nothing in these cases that touch the question at bar."

Here we have a case of an outright sale. The purchaser agrees to buy, and the city agrees to sell, at a price not prohibited by positive law, and where the interest upon the money actually received by the city is not in excess of the rate permitted by the statute. No fraud whatever, legal or otherwise, is alleged against the city or its councilmen, nor against the bond buyers. Concerning the form of the bonds, as compared to the terms of the sale actually agreed upon, we think it not controlling, but that it presents a situation similar in principle to that in the case of *Paine v. Port of Seattle*, *supra*, where bonds were sold at less than par so as to carry a rate of interest on the money actually received higher than that fixed in the bonds, of which it was said:

"Assuming that the rate of interest stated in the original resolution upon which the election was held is binding upon the commissioners, so far as the form of the bond is concerned, we think it in any event goes no further than this, since there was nothing therein relating to the price at which the bonds should be disposed of and there is nothing in the port district law to that effect."

In the case of *State ex rel. Grant Smith & Co. v. Seattle*, 74 Wash. 438, 133 Pac. 1005, the question submitted was whether the contractors should be charged with the interest accrued upon local improvement bonds from their date to the time of their respective delivery. The question was answered in the affirmative. In the opinion, after giving the substance of the statute, as follows:

"Section 8020, Rem. & Bal. Code, provides that local improvement bonds may be issued to contractors in payment for their work, or that the bonds may be sold at not less than their par value and accrued interest, and the proceeds thereof applied in payment of the amount due the contractor,"

it was said:

"If, under this section, the contractor takes the bonds in payment for his work, we think the only reasonable construction to be placed upon it is that he shall, as is the case when the bonds are sold to third parties, accept them at not less than par and accrued interest. It was not contemplated by the statute that there would be any difference in the amount paid the contractor whether he accepts bonds in payment for his work, or whether bonds were sold to others and the contractor paid in cash."

By analogy, it is argued that thereby this court held contrary to the rule in the cases of *Yesler v. Seattle* and *Paine v. Port of Seattle*. The argument is plausible but not sound. Where the statute provides that local improvement bonds shall not be sold

Nov. 1919]

Opinion Per MITCHELL, J.

at less than par and accrued interest, for cash, it means the statute fixes the minimum price at which the bonds may be disposed of, irrespective of market conditions, and that a contractor who takes his pay in such bonds must reckon according to that statutory price. Indeed, in the *Grant Smith & Co.* case, it was said:

“It is not questioned, as we understand the position of respective counsel, but that the contractors, in accepting these bonds in payment for the work, were to receive them at their face or par value.”

So that the question was one of the application of the law to the contract in question, and the court held the contractor chargeable with accrued interest.

The point is made by appellant that the proposed sale violates the statute, in that it provides for interest at the rate of six per cent per annum, while the statute provides the interest shall be paid semiannually. The statute states that the interest shall not exceed six per cent per annum, and certainly interest at a given rate, payable annually, is less favorable to an investor than if payments at that rate are made semiannually.

Lastly, appellant, treating the discount as interest, argues that it violates the statute requiring semiannual interest payments, and that the so-called discount interest would be paid in a lump sum, either at the time of completing the sale or at maturity of the bonds. This contention, we think, is technical and goes largely to the form of the bonds as compared with the terms of the actual transaction, which, as we have heretofore noticed, is not controlling.

Specifically, upon this very subject, the court in the case of *Kiernan v. City of Portland*, *supra*, well said:

“The provision as to the amount of bonds to be issued, their denomination, and the rate of interest

they shall bear has reference only to the form of the bonds and the method in which they shall be executed, in order to prepare them for sale.”

It is clear and evident that the purchaser is not to receive, nor is the city to pay, over six per cent interest on the semiannual basis; for that is the express provision of the bid.

There was no error in the judgment of the trial court and it is affirmed.

HOLCOMB, C. J., MAIN, TOLMAN, PARKER, BRIDGES, and MOUNT, JJ., concur.

MACKINTOSH, J. (dissenting).—The statute provides “that the city may issue and sell bonds bearing *interest* not exceeding six per cent per annum, payable semi-annually.” For two reasons, the arrangement sanctioned by the majority of the court in this case violates the foregoing provision of the statute. In the first place, the scheme adopted is not the issuance of bonds bearing interest at the rate of six per cent. The bonds bear the interest rate of five per cent, which is expressly provided for in the bonds, with a reduction below the par value as a discount, and its character is not changed by calling it interest, for it is not interest. The second reason is that the statute expressly calls for interest payments semiannually, and, adopting the majority view that the discount is, in effect, interest, makes the interest payable not according to the statute, five per cent interest being payable semiannually, and the balance in a lump sum; that is, it is paid at the time the deduction from the face value of the bonds is made.

This court, in *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825, frowned on a similar subterfuge, but we now seem to have smiled again at the present exhibition of high financing. The case of *Uhler v. Olympia*, 87

Nov. 1919] Dissenting Opinion Per MACKINTOSH, J.

Wash. 1, 151 Pac. 117, 152 Pac. 998, in effect, overruled the case of *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014, but we now seem to have revived that case and made it the basis for the present decision. It would seem that express constitutional and statutory provisions regulating the creation of a municipal indebtedness should receive some consideration in determining the validity of the methods adopted in the issuance of municipal obligations, but the decision in this case and others involving similar questions would indicate that the industry of creating public indebtedness is to be fostered at the expense of clear and explicit provisions of the law. When this industry has developed to such an extent that the taxpayer is no longer able to bear the burden, the courts will probably revert to fundamental principles and hold that constitutions and statutes are to be followed in the creation of municipal bonded indebtedness; but until such time, there seems to be no hope that such provisions will be given the consideration accorded them when considering transactions between private individuals.

It might be suggested that the proper way to issue six per cent bonds would be to issue them directly, and not to attempt by artifice to issue them by calling them five per cent bonds.

For the two foregoing reasons stated, I cannot agree with the opinion of the court.

[No. 15392. Department Two. December 1, 1919.]

TINA HANSON, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS (420, 464)—TORTS—DEFECTIVE SIDEWALK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Notwithstanding plaintiff testified that her fall was caused by the "wet and slippery" condition of a sloping sidewalk, the negligence of the city is for the jury, where it appears that the city rendered the cleats useless by filling the intervals with a tar, pitch or asphalt composition which was slippery.

SAME (448)—DEFECTIVE SIDEWALK—PLEADING—ANSWER—SUFFICIENCY. In an action for a fall upon a sloping sidewalk, an answer that the sidewalk was given a coat of tar and sand to prevent slipping does not negative the possibility of negligence; since it does not show that it was properly applied or prevented slipping.

STIPULATIONS (2)—TRIAL (100-1)—REQUESTS FOR INSTRUCTIONS. A stipulation that the court may instruct the jury orally does not waive the requirement that requests for instructions must be made in due time and in writing.

APPEAL (464)—HARMLESS ERROR—INSTRUCTIONS—REFUSAL OF REQUESTS. The refusal of an untimely oral request to instruct that mere slipperiness of the sidewalk does not constitute negligence is not prejudicial where other instructions correctly stated the city's duty and confined the jury to the negligence alleged.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 14, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

Walter F. Meier and Frank S. Griffith, for appellant.
Kellogg & Luccock and Ed. C. Hyde, for respondent.

TOLMAN, J.—This is an action for personal injuries sustained by falling upon a sidewalk in the city of Seattle, tried to a jury. From a verdict and judgment thereon in favor of respondent, the city appeals. In

¹Reported in 185 Pac. 581.

Dec. 1919]

Opinion Per TOLMAN, J.

her complaint respondent alleged, in effect, that the sidewalk, at the place where the accident occurred, was of concrete construction, sloping sharply towards the west (the direction in which respondent was proceeding), and also sloping from the building line towards the gutter, and that, in order to make the same safe for travel, the city had so constructed it as to place thereon at intervals concrete cleats or ridges with square shoulders to prevent slipping, which would otherwise occur by reason of the double slope, and the negligence charged was that the city, some time after the walk was constructed, but long before the accident, had carelessly and negligently placed and maintained upon the sidewalk "a composition composed of tar, pitch or asphalt, or some substance of the nature of same, and so carelessly and negligently applied the same that the same flowed against said cleats or ridges and filled the same to the shoulder or top, thereby destroying the usefulness of said cleats or ridges, and on account of the filling of said ridges and the slippery nature of the material so used, especially when wet, rendered said walk dangerous, unsafe and unfit for travel by pedestrians, especially during wet weather . . ." To support this allegation, respondent testified that she was generally familiar with the locality and this particular walk; had passed over it daily in going to her work for some two or three weeks immediately preceding the accident, and at intervals for a year or more before; that the walk at the place in question was slippery, and caused her to always exercise great care in using it; that the intervals between the cleats were filled with tar or some other substance, so that there was nothing to catch the heels of a person walking thereon; that she had never fallen there prior to the time complained of; that it had been raining shortly before the time

of the accident; the sidewalk was wet, and while walking carefully, she slipped and fell. On cross-examination she testified that she could not tell whether she had ever before passed over the walk when it was wet, and, "Q. Now the only thing which caused you to fall was the wet and slippery condition of that sidewalk, wasn't it? A. Yes." Two other witnesses, apparently disinterested business men, who had frequent occasion to use this sidewalk, also testified as to the slope, construction of the walk with cleats, the filling up between the cleats with what they described as a slippery substance; going in their testimony fully as far as the allegations of the complaint. Counsel for respondent offered in evidence, and read to the jury from the city's answer, the following:

"In answer to paragraph four, this defendant says that, in the using of the sidewalk on Madison Street, complaint was made because of its slippery condition, although it was constructed of rough cement with cleats, and to overcome that and make it safe for pedestrians, there was placed on the sidewalk a coat of tar product and sand, a substance used to prevent slipping; and denies each and every other allegation contained in said paragraph."

The city offered no evidence and moved for a nonsuit and an instructed verdict, and after a verdict was returned, for judgment *non obstante veredicto* and for a new trial. The denial of each of these motions is assigned as error, as is also the refusal to instruct, as will more fully appear.

Appellant's argument in support of its contentions that the evidence was insufficient to go to the jury is largely based upon the assumption that there was no evidence in the case going beyond the question propounded to respondent on cross-examination and her answer thereto as heretofore quoted. In such assumption we cannot agree with him. The testimony

Dec. 1919]

Opinion Per TOLMAN, J.

hereinbefore outlined, taken from the record, clearly indicates that there was evidence to go to the jury upon the question of whether the city was negligent in filling up the spaces between the cleats in the sidewalk so as to destroy the support which the cleats were designed to afford, nor can we give the effect to the quoted question and answer which is contended for. If counsel had omitted from his question the words "and slippery," so as to have obtained an answer to the effect that the sole cause of the fall was the wet condition of the sidewalk, then the argument would have been in point. But since he combines in his question both the wet and the slippery condition, his plea must have been, and no doubt was to the jury to find, that the respondent therein had in mind only the slipperiness caused by the wet.

If we concede that respondent was bound by the portion of the answer read in evidence, we find nothing therein that negatives the possibility of negligence. The paragraph read is an acknowledgment that the city, at some previous time, received notice of the slippery condition in spite of the cleats, but there is nothing therein indicating that due care required the obliteration of the cleats or that the substance applied was properly applied, or that as applied it would tend to prevent slipping.

Where, in addition, it is made to appear, as here, that the jury, after having their attention particularly called to the conditions thought to establish negligence by the testimony of the witnesses, viewed the premises, admittedly in the same condition then as at the time of the accident, except possibly the wetness, and had before them the evidence of the physical conditions from their own observation, we cannot say, as a matter of law, that there was no evidence upon which a verdict could be based.

It is further contended that the trial court erred in not instructing the jury to the effect that mere slipperiness of the sidewalk does not constitute negligence. After the court had instructed the jury, counsel requested the court to instruct as announced by this court in *Stock v. Tacoma*, 53 Wash. 226, 101 Pac. 830, on the question that mere slipperiness of the sidewalk does not constitute negligence. Instructions are required to be presented in due time to the trial court, in writing, so that he may properly consider the request to give them. The mere fact that counsel stipulated that the trial court might instruct orally and in writing was not a waiver of these conditions; and moreover, the case to which counsel directed the attention of the trial court does not deal at all with the question he desired the court to consider. Nor did counsel limit his request to such slipperiness as arises from natural causes. The trial court carefully called the attention of the jury to the negligence alleged in the complaint; instructed them that they could not go beyond these allegations, nor find the city guilty of any negligence except as there charged; correctly defined the city's duty in the matter of maintaining walks; instructed that negligence could not be presumed from the fact that plaintiff fell and was injured, and that the city was not an insurer, and correctly gave the rule as to contributory negligence. If counsel had duly presented the instruction correctly drawn, based upon the case of *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054, which case evidently he had in mind, and it had been given, we cannot say that the verdict would have been different.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

Dec. 1919]

Opinion Per MITCHELL, J.

[No. 15401. Department One. December 1, 1919.]

NORTH COAST POWER COMPANY, *Respondent*, v. COWLITZ,
CHEHALIS & CASCADE RAILWAY, *Appellant*.¹

RAILROADS—ACCIDENT TO TRAINS—COLLISION—CONTRIBUTORY NEGLIGENCE. A collision between an electric interurban car and a railroad flat car, using by agreement the same tracks, was due to the palpable contributory negligence of the electric motorman in running his car at speed through a dense fog past a siding when he had been ordered to operate his car under control.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered January 13, 1919, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Reversed.

A. A. Hull and H. E. Donohoe, for appellant.

Hayden, Langhorne & Metzger, for respondent.

MITCHELL, J.—The respondent, North Coast Power Company, sued the appellant, the Cowlitz, Chehalis & Cascade Railway, for damage to one of its electric cars caused by a collision with the appellant's cars between John street and Eleventh street, in the city of Chehalis, on November 1, 1917. In the trial without a jury, it recovered judgment, from which an appeal has been taken. The issues were negligence on the part of the appellant and contributory negligence on the part of the respondent.

The respondent owns and operates a single-track electric street-car line from Centralia to Chehalis, with intermediate sidings for the passing of its cars. At Chehalis its track passes near the Northern Pacific Railroad station, thence on south to John street. Connecting at the latter point, appellant owns and operates a single-track railroad for the transportation of

¹Reported in 185 Pac. 615.

freight and passengers, which extends into the southeastern part of the county. On November 9, 1914, a written agreement was entered into by the two companies by which appellant could use respondent's track from John street north to the Northern Pacific station, and respondent could use appellant's track from John street south to Eleventh street, a distance of twelve blocks (about thirty-six hundred feet) to a point near the state training school. Respondent extended its trolley wire over the track from John street to Eleventh street, and there was provided about midway between those streets a siding, over which there was no wire, to accommodate appellant's rolling stock as the electric cars passed over that stretch of the track. The written agreement contained no schedule as to time for the movement of trains, nor was there any signal or other system employed to advise each of the other's use of the track. Respondent had maintained a well-known time table by which its cars left Eleventh street, bound north, twenty-five and fifty-five minutes after the hour. Appellant had no time table for the movement of its freight cars, but generally made them up and moved them along this stretch of track, among other times, about seven to eight o'clock in the morning. There is considerable testimony as to which had the right of way over the other, sometimes spoken of as a clear right of way. The traffic officers of the two companies had several conversations looking to the establishment of regulations to prevent accidents, intending to put them in writing, which was never done. We are satisfied each had the right to use the track when unoccupied by the other, but in the case of conflict respondent had the right of way, for which purpose the switch or siding was prepared and equipped to accommodate the cars of appellant only. Such was the practice of the parties that on frequent

Dec. 1919]

Opinion Per MITCHELL, J.

occasions respondent's cars were delayed until appellant retired its engines and cars or placed them upon the switch. Respondent's cars were frequently off time at the Eleventh street terminus, caused generally by the interference of appellant in switching and making up its trains in that vicinity.

For some hours before and at the time of the collision, there was a dense fog all along the electric car line. At Chehalis, where the accident occurred, the fog was so dense that an object the size of a flat car could not be seen at a greater distance than fifty feet. The electric car last going north from Eleventh street prior to the arrival of the one in the collision, due to leave at 7:25 a. m., was delayed some eight or ten minutes by the use of the track by appellant in switching its cars. This loss of time in turn caused the south-bound electric car so much delay at the passing station between Chehalis and Centralia that the south-bound car, which was operated by one Arthur R. James, was four or five minutes late in arriving at the siding between John street and Eleventh street, where the collision occurred, about eight o'clock a. m. In the meantime, just before the accident, and for some unexplained reason or lack of it, appellant had left several of its flat cars on the main track by the siding on which its locomotive was standing. On the arrival of the street car operated by James, he could not see the flat car in time to avoid a collision. We are satisfied, as was the trial court, the facts established negligence on the part of the appellant.

On the other hand, respondent is chargeable with pronounced contributory negligence. William A. Schoel, manager of the respondent at and for eight months prior to the date of the accident, testified that the first thing told every motorman was to look out for other trains between John and Eleventh streets,

and that he gave Arthur R. James verbal instructions to operate his car under control and look out for trains between Eleventh street and the Northern Pacific passenger depot. The evidence is undisputed that the maximum speed of the electric car was twenty-two miles per hour; that, at such speed, the car could not be stopped in less than one hundred and twenty-five feet on an ordinary track; and that the stretch of track where the collision occurred was straight and level.

Arthur R. James, the motorman in charge of the electric car, testified that he was thirty-one years of age; that he had been working, without pay, for the company a week, "breaking in on the car," and that the accident occurred on his second trip from Centralia on the morning of the first day he worked for pay; that it was very foggy both trips; could see ahead possibly fifty feet; "you would have to be right up to them (passengers) before you could see them, because of the fog;" that he knew fog caused a difficult, slick rail; that he knew appellant operated its freight cars on this track, and himself had been held up before by freight cars on this main line; that the freight cars with which he collided were within fifty feet of him when he first noticed them, at which time his car was "open to the limit, going as fast as it could . . . about twenty miles an hour;" that he did not know within what distance he could have stopped his car under the circumstances, but did not think it could be stopped within fifty feet, but thought it might possibly be stopped within that distance if going only ten miles an hour; and that, for the operation of his car, he had received orders to be on the lookout below John street for appellant's freight and gas cars.

It is, according to both reason and authority, the rule that what would be due care under certain cir-

Dec. 1919]

Opinion Per MITCHELL, J.

cumstances would not be due care under other or different circumstances, and that, if anything in the surrounding conditions and circumstances reasonably suggests the necessity for an increase of care to avoid peril and damage, the duty to increase such care proportionately increases. This court, in *Hellesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, tersely said: "In determining the question of contributory negligence due care or ordinary prudence is the only known test." The evidence here presents a case of plain, palpable contributory negligence. The motor-man, in defiance of the caution and prudence not only suggested but demanded by his own knowledge based upon observation and experience as to the probability of there being freight cars on the main line south of John street, and in violation of the positive instructions of his superior, madly drove his car at that place with a speed far beyond his power of checking it within the range of his vision. Such contributory negligence precludes any right of recovery, notwithstanding the negligence on the part of the appellant. *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058.

Reversed, with directions to enter judgment in favor of the appellant.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 15491. Department Two. December 1, 1919.]

NATIONAL SURETY COMPANY, *substituted for Chicago
Bonding & Surety Company, Appellant*, v.
A. D. CAMPBELL *et al.*, Respondents.¹

DEPOSITARIES — DESIGNATION — ANNUAL APPOINTMENTS — STATUTES. The designation of a bank as county depository was intended to continue indefinitely and is not limited to one year, by Rem. Code, § 5072, providing that each county treasurer "shall" annually and at such other times as he deems necessary designate a bank as a depository for all public funds; since the word "shall" relates to the first designation, while the word "annually" must be read in connection with the words immediately following.

STATUTES (73) — CONSTRUCTION AS MANDATORY. Rem. Code, § 5072, providing that county treasurers "shall" annually designate a depository, is not mandatory as to requiring annual appointments; the time for the performance of an act generally being directory, and depending on the spirit as well as the letter of the law.

INDEMNITY (4, 5) — SCOPE AND EXTENT OF LIABILITY — LIMIT AS TO TIME. An indemnity bond to protect a surety on a county depository bond given by a bank is not limited to one year, where the depository's term and bond were not limited to any definite term, and the indemnity bond agreed to save and hold the surety harmless from any and all liability in consequence of having executed the depository bond.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered February 25, 1919, upon granting a nonsuit, dismissing an action on an indemnity bond. Reversed.

C. B. White and Donworth, Todd & Higgins (Hyman Zettler, of counsel), for appellant.

Troy & Sturdevant, Thomas M. Vance, and Bates & Peterson, for respondents.

TOLMAN, J.—This is an action upon an indemnity bond given by the respondent A. D. Campbell to protect the surety on a depository bond given by the

¹Reported in 185 Pac. 602.

Dec. 1919]

Opinion Per TOLMAN, J.

State Bank of Tenino to secure the deposit of public funds of Thurston county, under Rem. Code, § 5073. From a judgment of nonsuit in the trial court, the case is brought here on appeal.

The State Bank of Tenino, having been designated by the treasurer of Thurston county as a depository for public funds, caused a bond to secure such deposits, executed by itself as principal and the Chicago Bonding & Surety Company as surety, dated June 15, 1913, to be approved and filed as required by law, and as part of the same transaction, the bonding company obtained an indemnity bond from respondent A. D. Campbell, who was a stockholder and director of the bank, the conditions of which are as follows:

“Now therefore, if the above bounden A. D. Campbell shall and does pay in advance the premium or charges of Fifty Dollars (\$50), made by the company for executing said bond and continuing the same, and shall hold and keep harmless the company from and against any and all liability, loss, damages, costs, charges and expenses of whatever nature or kind which the company shall or may at any time sustain, incur, or be put to, or by reason or in consequence of the company having given and executed the said bond; also all costs and expenses which it may incur in investigating any claim made thereunder or in or about prosecuting or defending any action, suit or other proceedings which may be commenced or prosecuted against the State Bank of Tenino or against the company, upon the said bond or any wise in relation thereto; then this obligation to be void, otherwise it is to be and remain in full force and virtue.”

Deposit of current funds was made by the treasurer in due course, and thereafter, in September 1914, the bank closed its doors, having upwards of \$12,000 of the public funds on deposit. The bonding company paid its proportion of the loss and brought this action

against respondents to recover the amount so paid, plus its costs and expenses incurred.

At the close of plaintiff's case in chief, a motion for nonsuit was interposed, and the error assigned upon the granting of this motion and the subsequent entry of a judgment for the defendants is the only one we find necessary to discuss.

The motion was granted upon the theory that the designation of the bank as a depositary and the depositary bond given were by law limited to a term of one year, and that therefore the respondents, as indemnitors, contracted in the light of this limitation, and the loss having occurred more than one year after the giving of the indemnity bond, the indemnitors were not bound to respond. The statute, Rem. Code, § 5072, reads as follows:

"Each county treasurer in this state shall on the first day of July, 1907, and annually on the second Monday in January thereafter, and at such other times as he may deem necessary, designate one or more banks in the state as depositary or depositaries of all public funds held and required to be kept by him as such treasurer, and such designation or designations shall be in writing, and the same shall be filed with the board of county commissioners of his county, and no county treasurer shall deposit any public money in banks except as herein provided."

It is argued that this statute is mandatory as to the designation being made annually, and that, upon such designation being made, the depositary becomes such for one year only, or until the second Monday of January following, when the statute required a new designation and a new bond. If this be the correct interpretation of the statute, then, under the rule laid down in *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. 880, 19 L. R. A. 500, and a long line of decisions of other states, mostly concerning bonds of

Dec. 1919]

Opinion Per TOLMAN, J.

officials elected or appointed for a definite term, the judgment of the lower court was right. Our first inquiry must then be as to the meaning of the statute. The supreme court of Oregon, in construing a similar statute, said:

“However, a graver question arises when we take up the consideration whether the particular provision in thought is to be regarded as directory or mandatory. We think the true rule is expressed in the following language; ‘When the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly and prompt conduct of business merely, the provision may generally be regarded as directory.’ *Hurford v. City of Omaha*, 4 Neb. 350. To the same effect we cite Sedgwick on Constitutional Law, p. 372; 36 Cyc. 1158. In *People v. Lake County*, 33 Cal. 487, a case of recognized similarity, the Supreme Court, speaking through Mr. Justice Rhodes, said: ‘When a statute specifies the time at or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the language of the act contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right.’” *State ex rel. First Nat. Bank of Klamath Falls v. Siemens*, 68 Ore. 1, 133 Pac. 1173.

So in our statute, in the absence of language limiting the designation to the term of one year or requiring a complete re-designation each year, it seems plain that the legislature intended that any designation when made should continue indefinitely until the parties interested should take steps to terminate the relation. The use of the word “shall” rather than the word “may” in referring to the time when the designation is to be made does not evidence, we are convinced, a contrary intent. As was said by this court in *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095:

“ . . . it is a familiar rule of statutory construction that the spirit as well as the letter must be considered in determining whether its provisions are mandatory or directory. The words ‘may’ and ‘shall’ may be used according to the context and intent found in the statute, and are frequently construed interchangeably.”

The word “shall” as here used relates rather to the act of designation in the first instance, and the use of the word “annually” should be read in connection with the words “and at such other times as he may deem necessary,” as applying to new designations, and not as indicating a legislative intent that such designations should be for one year only and should cease to be effective at or before the time fixed for subsequent designations.

In a parallel case, the supreme court of Wisconsin said:

“No purpose could be served by arbitrarily requiring a renewal of such selection, contract, and bond at every annual meeting of the board, or at the meeting thereof in June, nor at any other particular time, and hence no such requirement was made. . . . In view of the contents of the section, and its purpose as therein expressed, we cannot hold that the word ‘annually,’ as used in the section, should be construed as a mandatory requirement that a new selection of a depositary, and a new contract with the same, must be made, and a new bond must be taken, at the expiration of every year.” *Manitowoc County v. Truman*, 91 Wis. 1, 64 N. W. 307.

The depositary bond under consideration here should not be confused with the usual fidelity bond and other like instruments, which, in so many words, are limited to a specified term and recite that they are renewable for a further term by the payment of an annual premium; and the fact that the premium on the depositary bond was payable annually does not

Dec. 1919]

Opinion Per TOLMAN, J.

make it a bond for one year. The bond ran to the county treasurer and contained no words of limitation; the premium was not payable by the treasurer; and, by the terms of the bond, he was advised that the surety company undertook to make good any default of the bank which might occur prior to the thirty-first day after notice should be served upon him of its election to terminate its liability; and if the premium were unpaid, or any other reason existed for such termination of liability, and notice was served upon him, he could protect himself by withdrawing the funds from the bank or requiring a new bond to be furnished within such thirty-day period. *Fidelity & Deposit Co. of Maryland v. Libby*, 72 Neb. 850, 101 N. W. 994.

If, then, the legislative intent was that a depositary once designated should continue to be such until by the withdrawal of the funds or some other act of the parties, or one of them, the relation should be terminated, and if the depositary bond did not provide otherwise, then, in the eyes of the law, the indemnity contract was entered into with that in view and the indemnitor, in broad language which requires no construction, undertook to "hold and keep harmless the company from and against any and all loss . . . which the company shall or may sustain, incur, or be put to, or by reason or in consequence of the company having made and executed the said bond."

Admitting the rule that in every doubtful case the presumption should be against a continuing guaranty, especially in the case of an uncompensated surety, yet where the indemnitor was a stockholder and director in the bank, was interested in seeing that it secured deposits of public funds, and knew that the purpose of the law was to require absolute security before the funds could be so deposited, which security must continue so long as the funds remained on deposit, and

in the light of that knowledge he contracted to indemnify the person providing that security, we can see no doubt of the indemnitor's intention.

"In the interpretation of indemnity contracts, the cardinal rule is that which applies to contracts generally, *i. e.*, to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms. Where the general import of a contract is one of indemnity, it is the rule that all of the words used therein should be construed to be in harmony with, and subservient to, the general purpose of the bond. When applied, however, this rule should be in aid of the intention of the parties and should not be employed to defeat their purpose." 14 R. C. L. p. 46.

That he may have undertaken to pay the first year's premium on the depositary bond is immaterial because he knew, or should have known, that the failure to pay any subsequent premium would not affect the county treasurer or his right to recover after default occurred.

The language of the depositary bond shows that it was not written for a definite term with a provision for renewal, and the law does not limit the life of a depositary bond to a definite term to be renewed or extended by a new designation; it follows therefore that the motion for a nonsuit should have been denied.

The judgment is reversed, with directions to proceed to a new trial.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

Dec. 1919]

Opinion Per FULLERTON, J.

[No. 15533. Department Two. December 1, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Walter Cline, Plaintiff*, v. THE SUPERIOR COURT FOR LEWIS COUNTY *et al., Respondents*.¹

MANDAMUS (29) — CRIMINAL PROSECUTIONS — COMPELLING FILING INFORMATION. Mandamus does not lie to compel the filing of an information and trial of accused, held by a committing justice, although accused had waived examination, where the justice retained the cause for examination; since the right of the superior court to control the action arises only after the justice's return.

Application filed in the supreme court September 16, 1919, for a writ of mandamus to compel the superior court for Lewis county, Reynolds, J., to direct the filing of a criminal information and to proceed with the trial thereof. Denied.

Gus L. Thacker, for relator.

Herman Allen, for respondents.

FULLERTON, J.—In this proceeding the relator seeks a peremptory writ of mandamus, directed to the judge of the superior court of Lewis county and the prosecuting attorney of the same county, requiring those officers to cause a criminal information to be filed against the relator and to proceed with the trial thereof. On an *ex parte* showing of the relator, an alternative writ was issued, to which the officers named have made return. The record as it is now before us discloses the following facts: On June 14, 1919, the relator was charged, by an information filed in the superior court of Lewis county, with the crime of murder in the first degree. He was arrested under a warrant founded on the charge and held without bail. Later on he entered a plea of not guilty to the charge,

¹Reported in 185 Pac. 605.

and the court set the cause for trial on September 4, 1919. At the time fixed for the trial, the court was engaged in hearing another criminal cause and the relator's cause was continued until a later day. When the cause was finally called for trial, the prosecuting attorney moved its dismissal for reasons stated in the record which need not be noticed here. After the dismissal, the relator was arrested on a criminal warrant issued by a justice of the peace sitting as magistrate, charging him with murder in the second degree, the act of the relator giving rise to the charge being the same act on which the information filed in the superior court was founded. He was immediately taken before the justice of the peace issuing the warrant, where he offered to waive examination, requesting at the same time that he be committed to answer to the charge in the superior court. The relator, however, did not offer to enter into a recognizance for his appearance in the superior court; on the contrary, he stated that he was unable to furnish bail, whereupon the justice of the peace retained the cause for examination, committing the relator to jail. The relator, through his counsel, then requested the prosecuting attorney to immediately file an information against him in the superior court so that he could be tried at the then pending jury term, and on the prosecutor's refusal so to do, applied to the judge of the superior court for an order compelling him to act. This application the judge denied, and this proceeding was instituted as before recited.

It is manifest from the facts recited that no reason exists for the interference of this court. The justice of the peace had not only made no return of his proceedings to the superior court, but, in so far as the record discloses, had not concluded his examination into the charge made against the relator. The right

Dec. 1919]

Opinion Per FULLERTON, J.

of the superior court to control the action of the prosecuting attorney with regard to filing an information against a person charged with crime before a magistrate arises only after the magistrate has concluded his examination and made return of his proceedings into the superior court. There was, therefore, nothing pending before the superior court on which the judge could base an order such as the one the relator applied for, and, in consequence, no action or inaction on the part of the judge which this court can control by a writ of mandamus.

It may be that, had the justice of the peace accepted the relator's offer to waive examination and had neglected to make return thereof for more than ten days, the superior court would have authority to compel such a return by some form of order, or, if return had been made and the prosecuting attorney had neglected for an unreasonable time to file an information in accordance with the return, the superior court could by order compel him so to do; but neither of these questions are presented in this record, and it is needless to discuss the rights of the respective parties under such situations. The record here shows no error either in the form of an abuse of discretion or otherwise on the part of the trial judge, and the peremptory writ asked for must be refused and the alternative writ issued quashed. It is so ordered.

HOLCOMB, C. J., MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 15564. Department One. December 1, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
JAMES HARDING, *Appellant*.¹

INTOXICATING LIQUORS (48)—DEFENSES—EXCEPTED CLASS—BURDEN OF SHOWING STATUS. Under Laws 1917, p. 60, § 17h, making it unlawful for any person, except a regularly ordained clergyman, priest or rabbi, to have possession of intoxicating liquor, the burden of showing that the accused was a clergyman or rabbi is upon the defendant as a matter of defense.

CRIMINAL LAW (197)—INDORSEMENT OF NEW WITNESSES—DISCRETION. It cannot be said to be an abuse of discretion to allow new names to be indorsed on the information seven days before the trial, where the record fails to show the grounds of the application or that any continuance was asked.

SAME (143) — EVIDENCE — DOCUMENTARY EVIDENCE — CERTIFIED COPIES. In a criminal prosecution, a certified copy from the office of the secretary of state of accused's application for an automobile license is admissible, in view of Rem. Code, §§ 5562-5, 5562-6, requiring an application in triplicate, one to be filed with the secretary of state.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 26, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

Walter M. Harvey, for appellant.

William D. Askren, for respondent.

PARKER, J.—The defendant, Harding, was adjudged guilty in the superior court for Pierce county upon an information filed therein against him charging:

“That the said James Harding, in the county of Pierce, in the state of Washington, on or about the first day of February, nineteen hundred and nineteen, then and there being, unlawfully did have in his possession intoxicating liquor, to-wit: thirty-eight (38) pints of whiskey, he, the said James Harding, then

¹Reported in 185 Pac. 579.

Dec. 1919]

Opinion Per PARKER, J.

and there not being a regularly ordained clergyman, priest or rabbi, . . .”

Our statute defines the offense of which the defendant was convicted as follows:

“ . . . it shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor . . .” Laws of 1917, ch. 19, p. 60, § 17h.

The defendant has appealed to this court.

The principal contention here made in appellant's behalf is that the evidence introduced upon the trial did not support the judgment rendered against him, in that there was not sufficient evidence showing affirmatively that he was not, at the time in question, a “clergyman, priest or rabbi.” We shall assume, for present purposes, that such was the condition of the evidence and that it was not sufficient to support the judgment, if the burden of affirmatively showing appellant to be without the protection of this exception of the statute rested upon the state. While the courts of the several states are not in harmony in their holdings as to the necessity of the state proving affirmatively that an accused is not within such an exception, we think the decided weight of authority is to the effect that the burden of showing that one so accused in such cases is without the protection of such an exception does not rest upon the state, but that, if the accused desire to justify upon the ground that he is exempt from the penalty of the statute under such an exception, it becomes a matter of defense, as to which the burden of proof rests upon him. This court in the early case of *State v. Shelton*, 16 Wash. 590, 49 Pac. 1064, held that the burden of proof, in a prosecution of one accused of selling intoxicating liquor without a license in violation of the statute, was upon him to

show that he had a license rendering him immune from prosecution, and not upon the state to prove that he did not have a license; citing Black, Intoxicating Liquors, § 507, and 1 Greenleaf, Evidence, § 79; the court expressing the opinion that such was the weight of authority in this country, though recognizing that the decisions were not harmonious upon the question. We note that the statute under which the defendant in that case was prosecuted contained the exception in the language of the statute defining the offense, and not in a separately stated exception or proviso, the definition of the offense being found in Ballinger's Code, § 7312, as follows:

“Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, . . .”

So that decision seems to be an answer to the contention of counsel for the appellant that the burden of proof in such cases as to such question does not rest upon the accused when the exception which he invokes for his protection is found in the statutory definition of the offense, or, as sometimes said, in the enacting clause, rather than in a separate exception or proviso. We are quite unable to see that the exception here involved is of any different nature, in so far as we are concerned with the question of the burden of proof, than where there is involved the question of burden of proof as to the accused possessing a license rendering him immune from prosecution. It would seem that the rule, which is sometimes called a rule of necessity, in view of the ease with which an accused person could produce proof of the fact which renders him immune—it being within his own knowledge and involving proof of a negative on the part of the state—has even stronger reasons for its support as appli-

Dec. 1919]

Opinion Per PARKER, J.

cable to the exception here involved. It seems to us, therefore, that the decision in that case is controlling here unless we are to overrule it, which we are not inclined to do. The law as there announced has been since adhered to in the following decisions of this court: *Kirkland v. Ferry*, 45 Wash. 663, 88 Pac. 1123; *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037; *State v. Polk*, 66 Wash. 411, 119 Pac. 846. See, also, 8 R. C. L. 173, and editor's note to *Bell v. State*, 36 L. R. A. (N. S.) 98.

Counsel for appellant call our attention to, and place some reliance upon, our recent decision in *State v. Koerner*, 103 Wash. 516, 175 Pac. 175, especially the concluding language of that decision. A critical reading of that decision will show that the real question there presented was as to whether or not the name of the person to whom the liquor was sold should be set forth in the complaint or information, the holding being that it was not necessary in so far as the complaint in the justice court was concerned, followed by an intimation that the complaint might be amended in that particular, if necessary, upon appeal and a trial *de novo* in the superior court. We think that decision is of no controlling force in our present inquiry, and we conclude that it was not necessary to support the conviction of appellant that the state affirmatively prove that he was not a clergyman, priest or rabbi, but, if he desired to justify upon that ground, it was for him to prove that he was one of that excepted class.

On March 3, 1919, some time after the filing of the information in the superior court, the prosecuting attorney obtained an order from the court permitting him to indorse the names of certain additional witnesses upon the information. This was accordingly

done by the prosecuting attorney. The trial occurred on March 10th, which, it will be noticed, was seven days thereafter. This, it is argued, was error to the prejudice of the appellant. The answer to this contention is found in the fact that there is nothing in the record before us as to the ground upon which the application and order was rested, nor as to whether or not any continuance was asked for in the appellant's behalf because of the indorsement of the names of the additional witnesses upon the information. It is plain, therefore, that we are unable to say that there was any abuse of discretion in making the order. The substance of our holdings touching this question is that in no event is the mere indorsement of additional names upon the information, prior to or even during the trial, of itself reversible error, though it may be grounds for continuance at the instance of the accused, the denial of which, if asked for, may be an abuse of discretion. The following decisions of this court render it plain that there is not here presented to us any reversible error in so far as this contention is concerned: *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897; *State v. Sexton*, 37 Wash. 110, 79 Pac. 634; *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27; *State v. McCaskey*, 97 Wash. 401, 166 Pac. 1163.

It is contended in appellant's behalf that the trial court erred to his prejudice in permitting the prosecution to introduce in evidence a certified copy, from the office of the secretary of state, of an application for an automobile license, which application was on file in his office, having been transmitted to him from the county auditor of Pierce county. Counsel's contention seems to be that this was not a certified copy

Dec. 1919]

Opinion Per PARKER, J.

of any original document officially on file in the office of the secretary of state, counsel seeming to assume that it was but an uncertified copy of an original application on file in the county auditor's office, a copy of which was transmitted to the secretary of state to advise him of facts upon which he could issue the license. We think counsel mistakes the nature of this document. Reference to the motor vehicle statute, found at pages 388 and 389, Laws of 1915, Rem. Code, §§ 5562-5, 5562-6, then in force, compels the conclusion that this application is the original made to the county auditor by the applicant, which by law he is required to transmit to the secretary of state, the same being made in triplicate, one copy to be retained by the county auditor for the county files and another to be retained by the applicant, all to be signed and sworn to before the county auditor, as was done by the applicant. It seems quite plain to us that this is nothing more than a certified copy made by the secretary of state of an original official document on file in his office. No question is argued by counsel for the appellant as to the materiality and admissibility in evidence of the facts shown upon the face of this application. We think it is quite plain the admission of the certified copy in evidence was not error.

There being no error disclosed by the record before us, the judgment rendered against appellant must be affirmed.

It is so ordered.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15590. Department One. December 1, 1919.]

ROBERT BAILEY, *by his Guardian etc., Appellant*, v.
SCHOOL DISTRICT No. 49, KING COUNTY,
Respondent.¹

SCHOOLS AND SCHOOL DISTRICTS (29-1)—TORTS—ACTIONS—RIGHT TO MAINTAIN—STATUTES. Laws 1917, p. 332, providing that no action shall be brought or maintained against a school district for non-contractual acts or omissions of officers or employees relating to playgrounds, applies to pending actions that had accrued prior to the enactment of the law.

CONSTITUTIONAL LAW (68)—VESTED RIGHTS—RIGHT OF ACTION IN TORT. As the right to sue a school district in tort rests in statute, it is not a vested right of property; hence Laws 1917, p. 332, repealing the law, is not unconstitutional in depriving a child of his former right of action for injuries sustained on playgrounds prior to the enactment of the law.

Appeal from a judgment of the superior court for King county, Hall, J., entered January 17, 1919, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a pupil while using playground apparatus. Affirmed.

Morris & Shipley and Thomas J. Casey, for appellant.

Fred C. Brown and Chas. Ethelbert Claypool, for respondent.

MACKINTOSH, J.—The appellant's ward was injured in December, 1916, while using certain playground apparatus belonging to the respondent. This action was commenced on May 3, 1917. The act of 1917 (ch. 92, Laws of 1917, p. 332) went into effect on June 6, 1917, and provides that:

"No action shall be brought or maintained against any school district or its officers for any non-con-

¹Reported in 185 Pac. 810.

Dec. 1919]

Opinion Per MACKINTOSH, J.

tractual acts or omission of such district, its agents, officers or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any school house or elsewhere, owned, operated or maintained by such school district."

And upon the strength of this act, the superior court sustained a demurrer to the appellant's complaint. Appellant states the question: "Does the legislative act of 1917 apply to a cause of action which had fully accrued prior to the passage of the act, an action upon the same being pending in the superior court at the time the act went into effect?" and insists that a negative answer is demanded, for the reason that a retroactive effect should not be given to the act, and if so given, the act is unconstitutional as taking property without due process of law.

The argument of appellant is, in the main, answered by our holdings in the cases of *Bruenn v. North Yakima School Dist. No. 7*, 101 Wash. 374, 172 Pac. 569; *Foley v. Pierce County School Dist. No. 10*, 102 Wash. 50, 172 Pac. 819; and *Holt v. School Dist. No. 71*, 102 Wash. 442, 173 Pac. 335; and that answer is that the appellant cannot "maintain" his action. The answer to the alleged unconstitutionality of the act would seem to lie in the fact that the right to maintain a tort action against a municipality is not a vested right in property. The right to sue the school district, before the passage of the act of 1917, rested entirely upon the statute giving such right, and to repeal that statute destroys no vested rights. The authorities relied on by the appellant do not deal with rights of action against municipalities which are solely the creation of statutes, but refer to vested rights as defined in *Pritchard v. Norton*, 106 U. S. 124:

"Hence it is that a vested right of action is property in the same sense in which tangible things are prop-

erty, and is equally protected against arbitrary interference. *Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."*

The appellant had no vested right, prior to judgment, in a policy of legislation which entitled him to insist that that policy be maintained for his benefit. The supreme court of the United States, in *Beers v. Arkansas*, 61 U. S. (20 How.) 527, has said:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

"Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the state consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire

Dec. 1919]

Opinion Per MACKINTOSH, J.

whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the state violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the state consented to be a party defendant."

The reasoning of that case, involving the right to repeal a law giving a right of action against the state while such action was pending, would seem to govern here.

The sustaining of the demurrer was correct.

Judgment affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ., concur.

[No. 15564. Department One. December 1, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
JAMES HARDING, *Appellant*.¹

INTOXICATING LIQUORS (48)—DEFENSES—EXCEPTED CLASS—BURDEN OF SHOWING STATUS. Under Laws 1917, p. 60, § 17h, making it unlawful for any person, except a regularly ordained clergyman, priest or rabbi, to have possession of intoxicating liquor, the burden of showing that the accused was a clergyman or rabbi is upon the defendant as a matter of defense.

CRIMINAL LAW (197)—INDORSEMENT OF NEW WITNESSES—DISCRETION. It cannot be said to be an abuse of discretion to allow new names to be indorsed on the information seven days before the trial, where the record fails to show the grounds of the application or that any continuance was asked.

SAME (143) — EVIDENCE — DOCUMENTARY EVIDENCE — CERTIFIED COPIES. In a criminal prosecution, a certified copy from the office of the secretary of state of accused's application for an automobile license is admissible, in view of Rem. Code, §§ 5562-5, 5562-6, requiring an application in triplicate, one to be filed with the secretary of state.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 26, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

Walter M. Harvey, for appellant.

William D. Askren, for respondent.

PARKER, J.—The defendant, Harding, was adjudged guilty in the superior court for Pierce county upon an information filed therein against him charging:

“That the said James Harding, in the county of Pierce, in the state of Washington, on or about the first day of February, nineteen hundred and nineteen, then and there being, unlawfully did have in his possession intoxicating liquor, to-wit: thirty-eight (38) pints of whiskey, he, the said James Harding, then

¹Reported in 185 Pac. 579.

Dec. 1919]

Opinion Per PARKER, J.

and there not being a regularly ordained clergyman, priest or rabbi, . . .”

Our statute defines the offense of which the defendant was convicted as follows:

“ . . . it shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor . . .” Laws of 1917, ch. 19, p. 60, § 17h.

The defendant has appealed to this court.

The principal contention here made in appellant's behalf is that the evidence introduced upon the trial did not support the judgment rendered against him, in that there was not sufficient evidence showing affirmatively that he was not, at the time in question, a “clergyman, priest or rabbi.” We shall assume, for present purposes, that such was the condition of the evidence and that it was not sufficient to support the judgment, if the burden of affirmatively showing appellant to be without the protection of this exception of the statute rested upon the state. While the courts of the several states are not in harmony in their holdings as to the necessity of the state proving affirmatively that an accused is not within such an exception, we think the decided weight of authority is to the effect that the burden of showing that one so accused in such cases is without the protection of such an exception does not rest upon the state, but that, if the accused desire to justify upon the ground that he is exempt from the penalty of the statute under such an exception, it becomes a matter of defense, as to which the burden of proof rests upon him. This court in the early case of *State v. Shelton*, 16 Wash. 590, 49 Pac. 1064, held that the burden of proof, in a prosecution of one accused of selling intoxicating liquor without a license in violation of the statute, was upon him to

terms of the contract theretofore existing between the respondent and Snyder, and that appellant's only obligation was to see that payment was made for the work so done. Clearly this was a special promise to pay Snyder's debt. *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D 849; *First National Bank v. Geske & Co.*, 85 Wash. 477, 148 Pac. 593, Ann. Cas. 1917B 564; *Pressentin v. Hawkeye Timber Co.*, 77 Wash. 388, 137 Pac. 999; *Dixon v. Parker, Moran & Parker*, 102 Wash. 101, 172 Pac. 856. We think the promise in this case is clearly distinguishable from the promise held to be an original one in *Burns v. Bradford-Kennedy Lumber Co.*, 61 Wash. 276, 112 Pac. 359, and that the facts in this case fall short of establishing that the leading purpose of the promisor was to subserve some interest or purpose of his own within the meaning of the rule there mentioned. As what we have said calls for a reversal of the judgment, it is unnecessary to consider the defense of *res judicata*.

The judgment is reversed, with directions to dismiss the action.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

Dec. 1919]

Opinion Per MOUNT, J.

[No. 15408. Department Two. December 2, 1919.]

WESTERN FARQUHAR MACHINERY COMPANY, *Respondent*,
v. C. R. PIERCE, *Appellant*.¹

EVIDENCE (149, 168)—PAROL TO VARY WRITING—WARRANTY IN SALE OF CHATTELS—COMPLETENESS OF WRITING. Upon the sale of a second-hand engine, under a written warranty expressly limited to a guarantee that it was in good working order and as described in the contract, a further warranty could not be proved by oral evidence, in the absence of fraud.

PLEADING (118)—ANSWER—AMENDMENT. It is not error to refuse to allow an answer to be amended at the trial, where it is not plain in what respect the answer would have been amended to state a valid defense.

REPLEVIN (22)—PLEADING—VENUE. Where the sheriff's return shows that property replevied was found in the county, error in failing to lay the venue in the complaint is cured.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered February 10, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Affirmed.

Ben S. Sawyer, for appellant.

Frank C. Owings, for respondent.

MOUNT, J.—This action was brought in replevin to recover possession of an engine sold to defendant under a conditional bill of sale. At the time the complaint was filed, an affidavit was also filed, describing the engine and alleging that plaintiff was entitled to possession thereof by reason of the fact that defendant had defaulted upon the conditional sale contract and had refused to pay the balance due thereon amounting to \$250; that demand had been made upon defendant for the return of the property; and that defendant had refused to either pay the purchase price or to return

¹Reported in 185 Pac. 570.

the property. With this affidavit was also filed a bond in replevin, as required by statute.

Upon serving this affidavit and bond, the sheriff took possession of the property in Thurston county, and thereupon defendant gave a redelivery bond and retained possession of the property. Afterwards defendant filed an answer, not denying any of the allegations of the complaint, but setting up several defenses, to the effect: First, that plaintiff sold to defendant a certain engine and equipment thereto, warranting it to be in good condition and to generate a horse power on the draw bar of thirty and on the belt of sixty, and that it would be amply able to furnish power for defendant's sawmill; that, with said representations and warranty, defendant purchased the engine and equipment; that the agreed price was \$700; and that defendant had, prior to the commencement of this suit, paid \$450 on the purchase price. Second, that, shortly after defendant received the engine and equipment, he ascertained for the first time that the engine was in poor condition and the equipment defective, that it would generate only twenty-five horse power at the belt, and would not generate sufficient power to run his mill as represented by plaintiff, and that a demand was made upon plaintiff to comply with his contract and plaintiff refused so to do. Third, that plaintiff guaranteed the engine and equipment to weigh about 25,000 pounds and the freight to be \$225; that, in fact, the engine, etc., weighed much more, and the additional charge was in the neighborhood of \$100, which defendant was required to pay, and which, on demand, plaintiff refused to repay defendant. Fourth, that, by reason of the failure of the engine to be as warranted, defendant was hindered and damaged in the operation of his mill in the sum of \$2,000, and in the installation and removal of the engine, in the further sum of \$300.

Dec. 1919]

Opinion Per MOUNT, J.

Fifth, that defendant was placed to the expense of making repairs on the engine in the sum of \$100, because of the poor condition. Sixth, that to replace the engine with an engine which would meet the warranties and representations made by plaintiff to defendant as to the engine in controversy would cost \$2,000. Defendant prayed for a judgment against plaintiff in the sum of \$4,500. Plaintiff, for reply, denied all the allegations of the affirmative answer. On these issues the case came on for trial to the court and a jury. After the jury was impaneled, it was conceded by defendant that there was no denial of the allegations of the complaint and that the burden was upon defendant to prove the allegations of his answer. Plaintiff objected to the introduction of any evidence under the answer. This objection was sustained, and a judgment was entered in favor of plaintiff as prayed for in the complaint. Defendant has appealed from that judgment.

Upon this appeal he alleges that the court erred in sustaining respondent's objection to the introduction of any evidence under the answer. The written contract set out in the complaint is admitted to be the contract between the parties. The only warranty contained in this contract is as follows:

"Guarantee: This being a secondhand engine and made by a factory not controlled by this company, it is fully understood that no guarantee accompanies this order except that the engine is as above described and represented. This clause cancels the guarantee clause below in this contract."

The paragraph above referred to as "above described and represented," is as follows:

"Russell Steam Tractor No. 14340. General Utility Type, weight about 30,000 lbs, catalogue rating 30-60-H. P. Same with regular equipment of drums and

water tank and 12" expansion Rims, same being a secondhand engine in fair condition and good working order. Size of fly wheels, etc., etc., are standard as described in the Russell catalogue. . . ."

The contract also provides as follows:

"The Western Farquhar Machinery Co. will not be responsible for any statements made by agents or salesmen, written or verbal, unless same is plainly stated in this order and approved by their officer accepting order."

It is apparent from the contract that there was no guarantee of the engine, except that it was in fair condition and in good working order. There is no allegation in the answer, and apparently no claim, that the engine was not in fair condition or good working order. It is true appellant alleged in one paragraph that:

"Said engine was in poor condition, and equipment defective, that it would generate only 25 horse power at the belt, and that it would not generate sufficient power to run his mill as represented by plaintiff."

This is the only allegation with reference to the poor condition of the engine, and this allegation is to the effect that it was poor because it would generate only twenty-five horse power at the belt, and that it would not generate sufficient power to run appellant's mill as represented by respondent. There was no such representation in the written contract. There was no allegation of fraud or overreaching. Before appellant could recover upon a guarantee, such guarantee must be contained in the written contract, and, in the absence of fraud or overreaching, could not be proved by oral testimony. *Buffalo Pitts Co. v. Shriner*, 41 Wash. 146, 82 Pac. 1016; *Pacific Aviation Co. v. Philbrick*, 67 Wash. 414, 121 Pac. 864; *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 147 Pac. 21; *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515.

It is clear that appellant was not entitled to prove warranties not contained in the written contract.

It is next claimed that the court erred in refusing appellant's motion to amend his answer. It is true that, during the discussion between counsel and the court, a reference was made by counsel for appellant to the effect that he desired to redraft the answer; and it is argued here that the court erred in refusing to permit an amendment to the answer. It is not plain from the record in what respect the answer could have been amended. It is not pointed out here wherein the answer could have been amended so as to state a defense to the action. The answer pleaded that the engine was in poor condition, but the poor condition was that it would generate only twenty-five horse power at the belt and that it would not generate sufficient power to run appellant's mill. But there was no guarantee of that kind contained in the contract. The only guarantee was that the engine was in fair condition and good working order, and these facts do not appear to be disputed.

Appellant next argues that the court erred in directing a verdict and in entering judgment for respondent. This argument is based upon the fact that there was no allegation that the property was in Thurston county at the time the action was commenced. When the property was taken possession of by the sheriff under the writ of replevin, the sheriff made return that he found the property in Thurston county. This was sufficient under the rule in *Stiles v. James*, 2 Wash. Terr. 194, 2 Pac. 188; and *Armour v. Seixas*, 80 Wash. 181, 141 Pac. 308.

We find no error in the record, and the judgment is therefore affirmed.

HOLCOMB, C. J., TOLMAN, BRIDGES, and FULLERTON, JJ., concur.

[No. 15444. Department One. December 2, 1919.]

*In the Matter of the Estate of SAM FELLIN.*¹

EXECUTORS AND ADMINISTRATORS (8) — RIGHT TO APPOINTMENT AS ADMINISTRATOR—NONRESIDENTS. A finding that a brother was not entitled to administer an estate because he was a nonresident is sustained, where he came to this state on learning of his brother's death and had resided here but five days when he filed his application.

SAME (15, 27)—PROCEEDINGS FOR LETTERS — REVOCATION — NOTICE. An application to revoke letters of administration and appoint the applicant must be made on notice, although the statute does not clearly so provide.

Appeal from an order of the superior court for King county, Hall, J., entered January 14, 1919, denying a petition for the appointment of an administrator and confirming a previous appointment, after a hearing before the court. Affirmed.

Geo. Olson and William R. Bell, for appellant.

Carroll B. Graves, for respondent.

MACKINTOSH, J.—Sam Fellin died November 1, 1918, leaving an estate consisting of personal property, and on November 22, 1918, one W. D. Merritt, a creditor, was appointed general administrator of the estate. Within fifteen days after such appointment, the appellant in this action, a brother of the deceased, filed a petition asking that the letters of administration issued to Merritt be revoked and that he be appointed general administrator of his brother's estate. The trial court, after hearing, denied the petition and confirmed the previous appointment of Merritt, holding that the appellant was a nonresident of the state of Washington, and therefore not qualified for appointment as administrator.

¹Reported in 185 Pac. 604.

Dec. 1919]

Opinion Per MACKINTOSH, J.

The testimony shows that the appellant, at the time of the death of his brother, was residing in Wyoming; that, learning of his brother's death, he came to Seattle, and had resided in that city for a period of five days prior to filing his petition, and three weeks prior to the hearing thereon for his appointment as administrator. An examination of the testimony satisfies us that it does not preponderate against the findings of the trial court, and that consequently the appellant is not entitled to letters.

For another reason, also, his petition was properly dismissed, and that is, that the appellant did not give notice of his application for appointment. Although our statute does not clearly establish the procedure, it must be that notice of the petition be given in order for the court to appoint an administrator and remove another who has theretofore been appointed.

For both these reasons, the order of the superior court is affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ.,
concur.

[No. 15447. Department Two. December 2, 1919.]

S. C. WHITE, *Executor and Trustee, etc., Appellant*, v.
VIVIAN CHELLEW *et al., Respondents*.¹

DEEDS—DELIVERY. Where a deed and will of the same property were made *in extremis* one day before the grantor's death, and it is evident no reservation was made, an immediate delivery of the deed was intended where the grantor stated they were all right and left them with the scrivener without directions as to delivery.

WILLS (1, 70-1)—ESTATES CREATED—CONDITIONS AND RESTRICTIONS—CONTESTING WILL. Where a deed to a devisee was made at the same time the will was executed, and the will recited that the property had been deeded to him, the grantee, to whom the deed was delivered at once, takes under the deed and not under the will, so that his estate is not defeated by a contest of the will, under the forfeiture clause in the will.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered April 25, 1919, dismissing an action to set aside a deed, tried to the court. Affirmed.

W. W. Langhorne, for appellant.

O. J. Albers, for respondents.

MOUNT, J.—This action was brought by the executor of the estate of Samuel Chellew, deceased, to set aside a deed made by the deceased in his lifetime to his brother, Vivian Chellew. Upon issues joined, the case was tried to the court without a jury, and resulted in a judgment dismissing the complaint. Plaintiff has appealed.

The record shows that the deceased, Samuel Chellew, on the 8th day of December, 1916, executed a deed of certain lots in the city of Centralia to his brother, respondent, Vivian Chellew. At the same time, Samuel

¹Reported in 185 Pac. 621.

Dec. 1919]

Opinion Per MOUNT, J.

Chellew executed a will which recited, among other things:

"I give and bequeath unto Vivian Chellew my brother the house and lots in Centralia, Washington, which I also have made a deed to the same to him."

The will also provided:

"that any legatee contesting or attempting to contest this my last will and testament be cut off and shall receive and be entitled to one dollar only."

This will and the deed were drawn by S. C. White, who was designated as the executor of the will. At the time the deed and will were executed, Samuel Chellew had been informed that he was *in extremis* and could live but a short time. Mr. White, the executor, testified in substance that no directions whatever were given with reference to the delivery of the deed; that Samuel Chellew, during the afternoon when the deed and will were made, looked them over while they were lying on the table and stated that they were all right. Upon the next day Samuel Chellew died. Immediately after his death, Mr. White, the executor, delivered the deed to respondent, Vivian Chellew. Mr. Chellew received the deed, had it recorded, took possession and control of the property, sold a part thereof, and thereafter joined with his sister, who, besides himself, was the only relative of the deceased, and filed a contest of the will upon the ground that it was procured by undue influence. That contest was never brought to trial, but was voluntarily dismissed. Thereafter, when respondent had retained possession of the property for about two years, this action was brought by appellant, with the result we have stated.

We think there are but two questions in the case: First, did the grantor in the deed intend an immediate

delivery? and second, did respondent hold under the deed or under the will?

We have had occasion in several cases to determine when a deed becomes effective. In the case of *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924, where a deed was executed a few days before the death of the grantor, where the grantor had called in a neighbor to prepare a deed and will in order that they might be executed, and where the deed was signed by the grantor in the presence of two witnesses, but not acknowledged, we held that an unacknowledged deed was good between the parties and that such instrument conveyed an equitable title. In that case we said, quoting from 1 Devlin, Deeds (2d ed.), § 269:

“ ‘Actual manual delivery and change of possession are not required in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed.’ ”

And in the case of *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756, which was a case quite similar to the one at bar, we said:

“The question of the delivery or nondelivery of a deed is one that must be governed by the intent of the grantor. *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324. Such intent must be gathered from the terms of the deed itself, if it can be consistently done. If the language used is susceptible of more than one construction, that one must be adopted which militates most strongly against the interests of the grantor. . . .

Dec. 1919]

Opinion Per MOUNT, J.

“A grantor’s deposit of his deed with a third party, to be held by such third party until the grantor’s death and then delivered to the grantee therein named, the grantor reserving no dominion or control over the deed during his lifetime, constitutes a valid delivery and vests an immediate estate in the grantee, subject to a life estate in the grantor.” [Citing a number of cases.]

In the case of *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042, we said:

“It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other. It may be made through the hands of an agent and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite.” [Citing a number of cases.]

There is nothing in the record before us to show that Samuel Chellew, at the time he executed this deed, intended to reserve any interest in the property. According to Mr. White, who drew the deed and the will, the grantor made no reservation. This deed and will were made on the 8th day of December, 1916. Upon the next day the grantor died, and upon the day following, or shortly thereafter, Mr. White, who drew the deed and the will and having the same in his possession, delivered the deed to Vivian Chellew and stated to him that the property was his and that he should look after it, or words to that effect; thus indicating that Mr. White understood, at least from the conduct of the grantor, that the grantor intended an immediate delivery of the deed. We think there can be no escape from the conclusion, under the authorities above cited, that the deed became immediately effective and conveyed the present title to Vivian Chellew.

Upon the question whether respondent held under the deed or under the will, we think it is equally plain that he took and held under the deed. The deed was delivered before the will was admitted to probate. In fact, at the time the deed was handed to respondent by Mr. White, the executor of the estate, who drew the will and deed, respondent did not know the contents of the will. He asked the executor what the will provided and the executor did not tell him, but stated that he could get a copy of the will when it was probated. In the case of *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316, where Zimmerman had received a deed to real property, which deed was set aside on the ground of undue influence, and he then sought to hold the property under a will, where there was a recital in the will that the property had been deeded to him, the court said:

“If the deed had been sustained, Zimmerman would have held title under it and not under the will. Clearly he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed he would then have held under it, and it only, because it would then have conveyed the grantor’s entire interest to the grantee, being ostensibly a deed in fee-simple. If it had effectively conveyed a fee, then it would have divested the grantor’s whole interest in the property, and having been executed prior to the will, there would have been no estate left in the grantor for the will to operate upon.”

We think it follows, therefore, that the estate was derived by respondent from the deed and not from the will; and the fact that respondent attempted to contest the will did not defeat his estate under the deed.

Appellant makes some contention here that the trial court erred in denying a motion for a new trial. What we have said above upon the merits of the case shows

Dec. 1919]

Opinion Per MACKINTOSH, J.

that the court did not err in refusing to grant a new trial.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., TOLMAN, BRIDGES, and FULLERTON, JJ., concur.

[No. 15527. Department One. December 2, 1919.]

A. R. TITLOW *et al.*, *Appellants*, v. PIERCE COUNTY *et al.*,
Respondents.¹

TAXATION (59, 210)—VALUATION OF PROPERTY—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. An assessment for taxation is so excessive as to be constructively fraudulent, where like property on four sides was assessed only one-fourth to one-seventh as much, and the assessor employed a minimum rate without considering the fair market value, which other evidence showed was only one-fifth as much as the assessment.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered April 3, 1919, dismissing an action to cancel a tax, tried to the court. Reversed.

A. R. Titlow, for appellants.

William D. Askren, *Frank D. Nash*, and *J. A. Sorley*, for respondents.

MACKINTOSH, J.—The appellants were the owners of 1,125 lots in outlying platted additions in Pierce county, and this action was begun for the purpose of cancelling and setting aside taxes thereon for the year 1917.

In the month of July, 1917, Pierce county began an action seeking to condemn these lots for the purpose of an army post site, and in the condemnation suit the jury returned a verdict in the sum of \$1,568 as the fair cash market value of the property. This sum

¹Reported in 185 Pac. 575.

was paid into the clerk's office of Pierce county, and the county treasurer asserted a claim against the funds in the sum of \$208.58 for taxes for 1917, which was based upon the assessed valuation as fixed by the assessor at \$5 per lot, which the assessor claimed to be fifty per cent of the actual fair cash market value of each lot. Upon the trial of the action, two witnesses were produced by the appellants who testified that the fair cash market value of the lots did not exceed \$1 each. The testimony further shows that the same kind of property, but unplatted, on the four sides of appellants' lots was assessed only from one-fourth to one-seventh as much per acre as were the appellants', and that, though the appellants' lots were in a platted addition, there had been actually no streets or alleys in use and the property was to all intents and purposes acreage property. The only other witness aside from these two real estate experts was the county assessor, who testified to a minimum valuation of \$5 per lot on the outlying platted property in conformity with a plan followed by him. It appears that this minimum valuation had been placed without considering the fair cash market value of each lot and parcel. The defendants introduced no evidence and the record is composed entirely of the testimony of the two experts and the assessor. The finding of the condemnation jury placed the fair cash market value of the lots at the sum of \$1.40 per lot.

Under this record, the valuation placed upon these lots was so excessive it must be held to be constructively fraudulent. We held in *Grays Harbor Construction Co. v. Grays Harbor County*, 99 Wash. 184, 168 Pac. 1138, that an assessment of three times the fair cash market value of property should be set aside for this reason. The same principle was announced in *Northern Pac. R. Co. v. Pierce County*, 77 Wash.

Dec. 1919]

Opinion Per MACKINTOSH, J.

315, 137 Pac. 433, Ann. Cas. 1916E 1194, and *Spokane & Inland Empire R. Co. v. Spokane County*, 82 Wash. 24, 143 Pac. 307, and also, *First Thought Gold Mines, Ltd., v. Stevens County*, 91 Wash. 437, 157 Pac. 1080.

The showing that a minimum valuation had been placed upon all outlying platted property is a showing of something that the law does not sanction. The assessment is to be made upon the fair cash market value, and the establishment of a minimum for all property regardless of its actual value is an arbitrary assessment which cannot stand. This position is not answered by the argument that the property in question is largely speculative, for the record shows, by the condemnation jury's award and the experts' testimony, that it has a real value. The tender made by appellants of the amount of taxes, based upon a valuation of fifty per cent of the actual cash market value as found by the condemnation jury, should have been accepted, and for that reason the action of the lower court in dismissing the plaintiffs' action and entering judgment against them is reversed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ.,
concur.

[No. 15568. Department Two. December 2, 1919.]

THE STATE OF WASHINGTON, *on the Relation of F. A. Mead, Plaintiff*, v. THE SUPERIOR COURT FOR YAKIMA COUNTY, *Defendant*.¹

INFANTS (4)—CUSTODY OF DEPENDENTS—POWERS OF COURT—MODIFICATION OF ORDER—PROCEEDINGS—DISCRETION. The juvenile court law, Rem. Code, § 1987-1 *et seq.*, having given the court power to modify or set aside an order for the custody of a child without providing the manner of its exercise or defining the person entitled to institute the proceedings, it is discretionary for the court to inquire into the interest of a party seeking the relief before directing process, which does not issue as a matter of right.

VENUE (20)—CHANGE—PREJUDICE OF JUDGE—TIME FOR APPLICATION. Since process to revoke an order for the custody of a child is not a matter of right, one who invokes the discretion of the court by filing an application for a modification cannot, after its exercise, ask a change of judges on account of prejudice, since it is not timely, under Rem. Code, §§ 209-1, 209-2, requiring an application for the change to be made on the party's first appearance.

Application filed in the supreme court September 30, 1919, for a writ of prohibition to prevent the superior court for Yakima county, Taylor, J., from hearing a cause, and to compel the transfer to another department of the court. Denied.

Reynolds, Ballinger & Hutson, for relator.

FULLERTON, J.—The relator, F. A. Mead, prays for a writ of this court prohibiting the Honorable Harcourt M. Taylor, one of the judges of the superior court of Yakima county, from presiding at the hearing of a certain cause pending in the court named, and to compel him to transfer the proceedings to another department of the court for such hearing.

Judge Taylor presides over the juvenile department of the superior court of Yakima county. In January,

¹Reported in 185 Pac. 628.

Dec. 1919]

Opinion Per FULLERTON, J.

1919, a petition was filed with the clerk of the superior court of the county named showing that there was within that county, in the custody of Lish Worrel and Lula Worrel, his wife, one Frederick A. Mead, some three years of age, who was a dependent child, praying that the superior court deal with such child as provided in the juvenile court law. Proceedings were had necessary to bring the interested parties before the court, and a hearing entered upon, at the conclusion of which the court found that the child was a dependent child within the meaning of the law cited and that the welfare of the child demanded that it be continued in the custody of Worrel and wife, and entered an order to the effect that the child be continued in their possession until the further order of the court.

On August 7, 1919, the relator petitioned the superior court for a modification of the order relating to the custody of the child, setting forth in the petition that he was the father of the child and a suitable and proper person to have its care and custody. On filing the petition, the relator applied to the court, Judge Taylor presiding, for an order directed to the persons having the custody of the child to show cause on a day certain why the order awarding them such custody should not be modified and an order entered in accordance with the prayer of the petition. The presiding judge, on the presentation of the petition to him, expressed a doubt whether the petition alleged facts sufficient *prima facie* to justify the relief asked, but after hearing counsel, granted the order, fixing August 19, 1919, as the day upon which the application would be heard. On the return day fixed, the attorney for the relator filed an affidavit under §§ 209-1 and 209-2 of the Code (Rem.) asking a transfer of the cause to another department of the court for trial, averring in the language of the statute that the judge

before whom the cause was assigned for hearing was prejudiced against the relator so that he believed he could not have a fair trial before such judge. The request for a transfer was denied by the court on the ground that the application came too late, whereupon the relator applied to this court for the writ before mentioned.

Relative to the transfer of causes under the statute cited, this court has held that the fact of prejudice, when suggested in the form prescribed, is not a matter of inquiry; that the fact is established by the statutory affidavit; and that, when the application is timely made, it must be granted as matter of right. We have further held that the timeliness of the application is to be tested by the status of the proceeding at the time the application is made; that the party desiring the change must make the application at his first appearance in the cause; that he must move before the judge presiding has made an order or a ruling involving discretion, as to hold otherwise would be to hold that the application could be made at any stage of the proceedings, a holding that would cripple and handicap the courts in their attempted administration of the law to an intolerable extent.

"We cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question." *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

The sole question for determination is, was the application for a transfer of the cause timely made. The

Dec. 1919]

Opinion Per FULLERTON, J.

first section of the act cited (Laws of 1913, p. 520; Rem. Code, § 1987-1 *et seq.*); defines dependent children and provides that, for the purposes of the act, all such children shall be considered wards of the state, and subject to the custody, care, guardianship and control of the superior court as in the act provided. Subsequent sections give the court power, when it finds a child to be dependent, to commit the child to the care of some reputable citizen, whereupon the child becomes, unless otherwise ordered by the court, the ward of, and subject to the guardianship of, the individual to whose care it is committed, and a later section provides that any order made by the court in the case of a dependent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper. While the statute provides who may institute a proceeding to determine whether a child is or is not a dependent child, and provides somewhat minutely the manner in which the child and the parties in interest are brought before the court, it is silent concerning the manner by which a judgment finding the child to be dependent may be changed, modified or set aside. It does not define the persons who may institute such a proceeding, nor the manner in which a proceeding may be instituted, nor how the parties interested therein may be brought before the court. In other words, the statute grants the power, but is silent as to the manner of exercising the power. Since, however, the power is granted, it was the intent of the law-making body that it should be exercised. The rule is that, when a general power is given, but the mode of its exercise is not prescribed, the procedure is to be regulated by the court in the exercise of its sound discretion. This would mean that, in a case like the one at bar, where no specifically defined person is granted the right to institute the proceeding, the court can in-

quire into the interest of the person seeking its institution and into the matter which he sets forth as his right so to do, before it directs that the parties representing the opposing interests be brought into court and required to answer. Contrary to the relator's contention, therefore, process does not issue on the mere filing of the application as matter of right. The application invokes the discretion of the court, and the court may, in the exercise of that discretion, grant or refuse to grant process on the application.

It follows in the instant case that, when the relator applied to the court for the issuance of process on his application for a modification of the order in question, he invoked the discretion of the court, and that his application for a change of judge, since it was made after that time, came too late under the rules as we have heretofore defined them.

The peremptory writ is denied, and the alternative writ heretofore issued is quashed.

HOLCOMB, C. J., MOUNT, MITCHELL, and TOLMAN, JJ., concur.

Dec. 1919]

Opinion Per Curiam.

[No. 15381. Department One. December 2, 1919.]

CHRIS PALLIS, *Respondent*, v. J. T. KUSUMI *et al.*,
Appellants.¹

APPEAL (445, 456) — HARMLESS ERROR — ARGUMENT OF COUNSEL.
Error cannot be predicated upon impropriety in argument of counsel that was corrected by prompt and adequate instructions.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 20, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

J. H. Templeton, for appellants.

Ryan & Desmond, for respondent.

PER CURIAM.—The only point urged as entitling the appellants to a new trial is that respondent's counsel overstepped the bounds of propriety in asking certain questions of the appellants while on the witness stand. The record, in our judgment, shows nothing prejudicial to the appellants' interest to have occurred, and whatever irregularities there may have been were corrected by prompt and adequate instructions by the court to the jury.

Judgment affirmed.

¹Reported in 184 Pac. 789.

21—108 WASH.

[No. 15317. Department One. December 3, 1919.]

LEAH HYNES, *Appellant*, v. COLMAN DOCK COMPANY
et al., *Respondents*.¹

HUSBAND AND WIFE (87) — COMMUNITY PROPERTY — PERSONAL INJURIES TO WIFE—ACTIONS—PARTIES. A wife, living with her husband, cannot, in the absence of any reason for not joining him, maintain an action alone for personal injuries, since the same is community property in the sole management and control of the husband, under Rem. Code, § 5917.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 20, 1918, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

Russell & Blinn (J. W. Russell, of counsel), for appellant.

J. Speed Smith and *Henry Elliott, Jr.*, for respondents.

MACKINTOSH, J.—The appellant, a married woman, instituted this suit against the respondents for damages arising from personal injuries sustained by her through the alleged negligence of respondents. The appellant's husband was made a party defendant for the reason, as alleged, "that plaintiff is unable to procure the consent of her husband to join in with her as one of the plaintiffs herein." A demurrer to the complaint on the ground of defect of parties plaintiff was sustained, and the case is here for us to decide whether a wife can maintain an action for personal injuries to herself without her husband joining as party plaintiff when he has merely refused to so join.

The tort action here involved was community personal property, and, therefore, under Rem. Code,

¹Reported in 185 Pac. 617.

Dec. 1919]

Opinion Per MACKINTOSH, J.

§ 5917, giving the husband like power thereover as he has of his separate personal property, he has the sole power of managing, contracting and disposing thereof. In *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28, Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808, the right to sue for personal injury to the wife was held to be in that member of the community who has the disposition of the community personalty, and "in this case, therefore, the husband was the only necessary party, though the wife was a proper party." The *Hawkins* case cites *Ezell v. Dodson*, 60 Tex. 331, which resembles the case at bar, it being one which the wife had begun for damages for an assault and battery committed on her by a third party. Her husband was not joined as a party plaintiff, and this omission was explained by his refusal to join and the fact that he and his wife were living separate and apart. The Texas court said:

"The mere fact that husband and wife are not living together does not authorize the wife to sue alone in any case where she could not thus sue if they were not separated. The refusal of a husband to become a party to an ordinary suit to recover community property would not give the wife the power to sue alone, when they were living together and he was exercising rightful control over the common estate. She could not, contrary to his wishes, assume the control over such estate and bring suit for its recovery, and his refusal to join in such an action would be sufficient to defeat it. An ordinary separation, and much less one caused by her own unprovoked abandonment, would not give her more rights in this respect than she would possess if living amicably with her husband.

"Ordinarily there would be no difference between an action upon contract and upon tort in reference to the wife's right to bring suit without joining the husband as plaintiff, as the one is as much community property as the other. Cases might, perhaps, arise where the wife could, under their peculiar circum-

stances, sue alone for a trespass to her person, whether she lived with her husband or apart from him. A less aggravated case of abandonment on his part might be sufficient in some instances to give her this right; or if he was the accessory to the outrage, or in other cases which might be mentioned, the wife would doubtless be allowed to maintain the action alone. It will be sufficient to determine the law of such cases when they arise. This is not one of them, and it is only necessary for us, for the purposes of the present suit, to hold that a mere separation of the husband and wife, and his refusal to join her in the action, is not sufficient to authorize the wife to prosecute alone a suit for assault and battery committed upon her during coverture. This court rightly sustained the exception of defendant, and the judgment is affirmed."

See, also, *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701.

In *Hammond v. Jackson*, 89 Wash. 510, 154 Pac. 1106, we held that a wife could not enter into a valid contract for the employment of a lawyer to prosecute an action for damage for her personal injury:

"The sole question presented is whether a married woman, living with her husband, may make a valid contract with an attorney to prosecute an action in damages against one by whose negligence she has suffered a personal injury. Rem. & Bal. Code, § 181, provides that, when a married woman is a party, her husband must be joined with her, except (1) when the action concerns her separate property; (2) when the action is between herself and her husband; and (3) when she is living separate and apart from her husband. It further provides that husband and wife may join in all causes arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or out of any contract in favor of either or both of them. Construing these sections, we have repeatedly held that the husband is a necessary party to all actions arising because of personal injuries to the wife, if the

Dec. 1919]

Opinion Per MACKINTOSH, J.

parties were living together as man and wife at the time the injury was received. *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701, and cases there collected. Indeed, our holding has been that the husband was the only necessary party to such an action. This on the principle that the claim of damages for the injury was community personal property of the spouses, and since the statute (Rem. & Bal. Code, § 5917), vests in the husband while living with his wife the management and control of such property, he has power to deal with it as if it were his separate property, which includes the right to maintain actions concerning it, the wife being only a proper party to such actions . . . From the foregoing it follows, we think, that the wife cannot make a valid contract with an attorney to prosecute an action for personal injuries suffered by herself. Since the husband alone can maintain such an action, it must follow that he has the right to have a voice in any contract that affects the condition upon which the action is to be maintained. To hold otherwise is to hold that the husband's management and control of the community personal property is not absolute as the statute presupposes, but is subject to such contracts as the other spouse may choose to make concerning it. This, we think, is not the meaning of the statute."

The only case that might be construed to hold contrary to the rule that the husband is the necessary party in all actions involving community personal property (except in the three instances provided for in the statute) by reason of the exclusive control thereof vested in him is the case of *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111, where the court decided that the husband's right of management and control and disposal of community property did not allow him the right to a "wilful, premeditated waste of family personal property," and that the wife could maintain an action to recover community personal property abandoned by the husband, who had left the state.

In the instant case, we find no allegation in the complaint of a wilful abandonment or dissipation or waste of the community personalty, nor of the husband's failure to exercise his honest judgment in refusing to institute the action. The complaint, having no allegation except that the wife has failed to procure her husband's consent to join, does not allow her to make him a party defendant under Rem. Code, § 189. To hold otherwise would be to nullify the rights given by the statutes regarding community personal property and to overrule a long established line of authority.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
CONCUR.

[No. 15390. *En Banc*. December 3, 1919.]

J. A. MILLER, *Respondent*, v. W. M. SCARBROUGH *et al.*,
Appellants.¹

CHATTEL MORTGAGES (49)—VALIDITY—STOCK IN TRADE—SALES AND PROCEEDS—RIGHTS OF CREDITORS. A chattel mortgage upon a shifting stock of merchandise, leaving the mortgagors to sell in the course of trade, to be valid as against creditors, should identify the property and must provide for application of the proceeds on the mortgage debt and for accounting and payments; and is void as to creditors where the mortgagors were permitted to dispose of the stock and apply the proceeds to their own use, without making agreed payments on the debt.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 15, 1919, upon findings in favor of the plaintiff, in an action to reinstate a chattel mortgage and for a foreclosure, tried to the court. Reversed.

¹Reported in 185 Pac. 625.

Dec. 1919]

Opinion Per MACKINTOSH, J.

W. B. Layton and *W. W. Keyes*, for appellants.

E. D. Hodge, for respondent.

MACKINTOSH, J. — The appellants Scarbrough, in March, 1918, gave to the respondent a mortgage upon their stock of drugs and fixtures. Thereafter this mortgage was cancelled, and in September, 1918, the appellants Scarbrough and Cowen, then being partners in the drug business, gave to the respondent a mortgage upon the stock and fixtures. Respondent alleges that this cancellation was induced by false representations, relying upon which he was persuaded to satisfy the first mortgage and accept the new note and mortgage. In November, 1918, the appellants Scarbrough and Cowen made a common law assignment for the benefit of their creditors to the appellant Layton. The respondent began this action seeking the reinstatement of the first note and mortgage of March, 1918, and asking for a foreclosure; the assignee, having intervened in the proceedings, alleged that the respondent's mortgage was void for the reason that it covered a shifting stock of merchandise, and contained no provision for an accounting, and that the mortgagors had been permitted to remain in possession of the stock and had been disposing of it in the usual course of trade. The trial court found that respondent was entitled to reinstate the first mortgage and allowed him foreclosure.

Appellants first advance for consideration the argument that the respondent was not entitled to have the original mortgage reinstated and foreclosed. It is not necessary to discuss or decide this phase of the question, in view of the determination which we have reached upon the main question involved, which is, Are either of these mortgages valid as a matter of law?

Neither mortgage contains any provision that the

owner of the property, who was to remain in possession and conduct the business, was to render at stated periods, or at all, any accounting of the conduct of the business; nor does the testimony disclose any oral understanding between the mortgagors and the mortgagee looking towards any such accounting. The mortgages contained an agreement that the mortgagors "are at all times until the final payment on this mortgage to keep a stock of goods on hand equal to the invoice price of said stock now in building," and the further provision that the debt of \$5,300, for which the note and mortgage were given, was to be reduced at the rate of \$100 per month. The stock, at the time of the giving of the mortgage in March, 1918, seems to have been of the value of \$6,500.

Where a chattel mortgage is given upon a shifting stock of merchandise, the mortgage should identify the chattels with such particularity that they can be determined without difficulty and *uncertainty*. Under the decisions of this court, where the mortgagor has the right to continue in possession of the chattels and to dispose of them in the usual course of trade, the mortgage itself, or some collateral agreement, must provide, in order for it not to be held void as a matter of law as to creditors, that the mortgagor shall, as he sells the property, apply the proceeds to the mortgage debt or account for such sales. In the present case the mortgages contained no such provision. The mortgagor was free to take the proceeds of the sales and use them in any way in which he might see fit, the only provision being that he should keep the stock equal to the invoice price as then inventoried. The provision for the payment of \$100 per month did not call for a payment from the business, but might be furnished to the respondent from any source available to the mortgagors. The respondent was a frequent visitor at the

Dec. 1919]

Opinion Per MACKINTOSH, J.

place of business of appellants and knew that they were allowing the stock to decrease far below the stipulated amount, until at the time of the assignment it was valued at something less than \$3,000, and took no steps to foreclose this mortgage before that time.

Keyes v. Sabin, 101 Wash. 618, 172 Pac. 835, contains the statement of the law of this jurisdiction, although the decision of the case itself was grounded upon another point. The court there had under consideration a mortgage which covered a general stock of merchandise, of which the mortgagors were left in possession with power to dispose of the same in the usual course of trade, without any agreement, oral or written, to apply the proceeds, or any part thereof, to the satisfaction of the indebtedness. The court stated:

"It may be remarked in passing, however, that such mortgages were held void *per se* as to creditors by the territorial court in the cases of *Wineburgh v. Schaer*, 2 Wash. Terr. 328, 5 Pac. 299, and *Byrd v. Forbes*, 3 Wash. Terr. 318, 13 Pac. 715, and no case from the state court has been pointed out to us where a contrary doctrine has been announced. We have held such mortgages valid when accompanied by an agreement, either parol or written, that the proceeds derived from the conduct of the business shall be applied to the satisfaction of the mortgage debt, or to the running expenses, the keeping up of the stock, and the satisfaction of the debt, and have held a mortgage valid where the agreement was that the mortgaged stock should not be reduced below a fixed value; but no case, as we say, holds that a mortgage is valid where the mortgagor is permitted to remain in possession of the property and dispose of it by sale in due course of trade with no obligation to account for such sales prior to the maturity of the mortgage debt."

In *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604, there was a verbal agreement between the parties to the mortgage that the mortgagor should

have the right to sell the goods in the usual course of trade and with the proceeds pay for such new goods as might be received to maintain the stock, and to devote so much of the proceeds as was necessary to the expense of conducting the business, and apply the balance to the discharge of the mortgage obligation.

In *Van Winkle v. Mitchum*, 66 Wash. 296, 119 Pac. 748, the court sustained the validity of the mortgage by reason of the provision allowing the mortgagor to apply part of the proceeds to the extinction of the indebtedness and the balance to replenishing the stock and in operation of the business.

The mortgage in *Nason & Co. v. Stack*, 81 Wash. 147, 142 Pac. 477, being for \$4,000, provided that the mortgagor could reduce the stock, inventoried at the time of the mortgage at \$16,000, to \$12,000, providing that an amount equal to one-half of the reduction should be applied to the mortgage indebtedness, the court saying:

“That reduction was the limit and, so far as we can observe, there is nothing to gainsay respondent’s position that it was considered that a \$12,000 valuation would represent all the stock required in the business, and that the payment of one-half of this reduction to the mortgagee would leave ample funds in the hands of the mortgagor to carry on his business and meet his current bills.”

We cannot view the facts of this case other than as constituting a situation where the mortgagors were permitted by the mortgagee to remain in possession of the stock and to trade and make sales therefrom in the ordinary course of business, agreeing to maintain the value of the stock equal to that at the time of its inventory, but being allowed to apply the proceeds of the sales to the mortgagor’s own use, and under no obligation to account to the mortgagee or to apply the proceeds to the extinguishment of the mortgage debt.

Dec. 1919]

Opinion Per MACKINTOSH, J.

Such mortgage is invalid and void as to general creditors, who in this case are represented by the assignee of the appellants, Scarbrough and Cowen.

As has been indicated, there is in this case no such collateral verbal understanding as this court has in several cases decided would validate a mortgage on a shifting stock of goods, and therefore those cases are not directly before us to be affirmed or reversed; but, in fairness to those interested in questions involving such mortgages, and for their future guidance, it should be stated here that the court is of the opinion that the line of cases sanctioning collateral oral agreements should not be longer followed, being convinced that the rule such cases announce is illogical in reasoning and vicious in result. The proper rule to be applied to mortgages hereafter executed should be that, for a chattel mortgage on a shifting stock of goods, which is to remain in the possession of the mortgagor to be disposed of in the usual course of trade, to be valid the mortgage itself should provide the manner of maintaining and handling the stock, with provisions for an accounting and payments on the mortgage debt from the proceeds of the sale, after allowing for the expenses of the business and of the keeping up or building up thereof, to the end that creditors can, by an examination of the record, discover the real terms and obligations of the mortgage.

The judgment of the lower court is reversed.

All concur.

[No. 15446. Department Two. December 3, 1919.]

*In the Matter of the Estate of KATE SMITH.*¹

EXECUTORS AND ADMINISTRATORS (169)—SETTLEMENT OF ACCOUNT—OPERATION AND EFFECT. The approval of an administrator's final account is not prevented by the pendency of an appeal upon a disputed claim, the amount of which was deposited with the clerk to abide the result of the suit; since by Laws 1917, p. 694, § 180, a final settlement does not prevent subsequent letters in case other property is discovered.

Appeal from an order of the superior court for King county, Reynolds, J., entered February 10, 1919, approving the final account of an administrator, after a hearing before the court. Affirmed.

W. W. Langhorne, for appellant.

O. J. Albers, for respondent.

MOUNT, J. — This appeal is from an order of the lower court approving the final account of the administrator of the estate of Kate Smith, deceased, and finally closing that estate. At the time the final account of the administrator was filed, the executor of the estate of Samuel Chellew, deceased, filed objections to the final settlement because of an unpaid claim of \$36.90, and because of certain litigation which had been pending between the two estates. On a hearing of these objections to the final account of the administrator of the estate of Kate Smith, deceased, it appeared that, while the claim for \$36.90 and costs was disputed, the amount of these costs had been deposited with the clerk to abide the result of the dispute. The record also shows that thereafter this dispute was settled and the amount was paid. It also appeared, at the time of the hearing of the final account, that the

¹Reported in 185 Pac. 618.

Dec. 1919]

Opinion Per MOUNT, J.

litigation referred to had been determined by the lower court and that a notice of appeal had been given from its final judgment therein. The trial court thereupon settled the final account and ordered distribution of the estate. This appeal was taken from that order by the executor of the estate of Samuel Chellew, deceased.

Appellant argues that the court erred in settling the account and estate because of the provisions of § 179 of chapter 156 of the Laws of 1917, p. 693, which provides as follows:

"If there be any contingent or disputed claim against the estate, the amount thereof, or such part thereof as the holder would be entitled to, if the claim were established or absolute, shall be paid into the court, where it shall remain to be paid over to the party when he shall become entitled thereto; or if he fail to establish his claim, to be paid over or distributed as the circumstances of the case may require."

The item of cost above referred to was deposited as required by this section. If the litigation referred to may be said to be a contingent or disputed claim, that claim was adjudicated and disposed of, so far as the lower court was concerned, at that time. If the notice of appeal revived the disputed claim, we are at a loss to see wherein appellant was aggrieved by the final order settling the estate, because the next section of the act of 1917 (p. 694, § 180) provides:

"A final settlement of the estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be discovered, or if it should become necessary and proper from any cause that letters should be again issued."

So that no right was lost to appellant should he be successful on the appeal in that case.

The order appealed from is therefore affirmed.

HOLCOMB, C. J., TOLMAN, and BRIDGES, JJ., concur.

[No. 15450. Department One. December 3, 1919.]

ALFRED SHEMANSKI *et al.*, Appellants, v. A. GOLDBERG,
Respondent.¹

VENDOR AND PURCHASER (60) — RESCISSION BY VENDEE — FRAUD — RELIANCE ON REPRESENTATIONS. Purchasers of lots in a townsite in the far north of Canada, may rely on representations of the vendor as to the value and situation of the property; and recover purchase price paid on sales induced by false representations.

Appeal from a judgment of the superior court for King county, French, J., entered December 4, 1918, upon findings in favor of the defendant, in an action for rescission, tried to the court. Reversed.

Max Hardman, for appellants.

Vince H. Faben, for respondent.

MACKINTOSH, J.—The respondent was a friend of appellant Danziger, and interested him and the other appellants in the purchase of lots in the townsite of Fort Salmon, Province of British Columbia, Canada, and the appellants now ask the court to rescind the transaction, alleging that they were induced to pay \$1,400 for Fort Salmon lots by the false representations of the respondent. These representations related to the value of the property, its claimed exemption from taxation for five years, the presence of a railroad and the survey of others, and the location of a post office.

It is needless to review in detail the interesting record, but its examination shows the representations to have been false and compels the conclusion that valueless property, located at some indefinite place in the wild northland, was sold to Danziger and his two associates by his pseudo-friend, who, upon the witness

¹Reported in 185 Pac. 574.

Dec. 1919]

Opinion Per MACKINTOSH, J.

stand, was astonishingly unenlightening about all the matters which related to the location, value and conditions of the property. Nor were the witnesses called to establish the *bona fides* of the transaction by proof as to these matters able to even approximately define the situs of the town of Fort Salmon. The position of the respondent was tersely revealed when, in answer to an inquiry as to a material condition of the townsite, he said: "I don't know, and don't care."

Equipped with that amount of information and animated by that degree of solicitude, he cannot now say that the appellants were unjustified in relying upon his representations founded on what, at the time, he claimed was knowledge and made with what, at the time, he asserted was accuracy. When one is engaged in the sale of far-off lands to his friends, upon representations as to their value, location and desirability, he should both know and care.

The record persuades us that the judgment should have been for the appellants, and it is so ordered. The appellants will have judgment for \$1,400, and interest and costs.

MITCHELL and MAIN, JJ., concur.

[No. 15501. Department One. December 3, 1919.]

THOMAS F. KENNERY, as *Times Square Garage*,
Appellant, v. NORTHWESTERN JUNK
COMPANY, *Respondent*.¹

SALES (176) -- CONDITIONAL SALES -- RECORDING -- SIGNATURE OF VENDOR. Under Rem. Code, § 3670, requiring all conditional sales contracts to be signed by the vendor and vendee, a contract is not sufficiently signed by the vendor by appending at the foot in type-writing as follows: "Times Square Garage, By.....Vendor" (HOLCOMB, C. J., dissenting).

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 14, 1919, upon sustaining a demurrer to the complaint, dismissing an action for conversion, tried to the court. *Affirmed*.

Cassius E. Gates and *Gates & Helsell*, for appellant.
Jones & Riddell, for respondent.

PARKER, J.—The plaintiff, Kennery, doing business as the Times Square Garage, seeks recovery of an automobile from the defendant, Northwestern Junk Company, resting his right of recovery upon an alleged forfeiture of the rights of Isaac C. Wood therein under a claimed conditional sale contract entered into between them, and the filing of such contract in the office of the auditor of King county. The case was disposed of by the superior court upon the allegations of the plaintiff's complaint. The defendant having demurred to the complaint, the court having sustained the demurrer, and the plaintiff having elected to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

¹Reported in 185 Pac. 636.

Dec. 1919]

Opinion Per PARKER, J.

The controlling facts may be briefly summarized from the allegations of the complaint, as follows: On June 18, 1918, appellant, being then the owner of the automobile, delivered it to Wood with a view of making a sale thereof to him. There was, at the same time, an instrument drawn up purporting upon its face to be a conditional sale contract, by the terms of which the title to the automobile was to remain in appellant until the full payment of the purchase price by Wood. This instrument was, within ten days after taking possession of the automobile by Wood, filed in the office of the auditor of King county as a conditional sale contract. Wood signed the instrument as vendee. The words claimed to be the proper signature of appellant were appended at the foot of the instrument in typewriting, as follows: "Times Square Garage, By....., Vendor." Thereafter the automobile passed into the hands of respondent as an innocent purchaser for value, unless it be held that this instrument is a properly executed conditional sale contract, the filing of which in the auditor's office gave the respondent constructive notice of such contractual relation between appellant and Wood.

Counsel for appellant proceed in their argument upon the assumption that the only question in the case is whether or not the typewritten words appended at the foot of the instrument, to wit: "Times Square Garage, By, Vendor," is a sufficient compliance as to signature by appellant as vendor with § 3670, of Remington's Code, which, in so far as necessary to here notice its language, reads as follows:

" . . . all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all *bona fide* purchasers, . . . unless within ten days after the taking

of possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides . . . ,

It is argued in appellant's behalf that the typewriting of the words "Times Square Garage" at the foot of the instrument answers the requirement of the statute as to signing by the vendor. The argument proceeds upon the theory that the typewriting by the vendor of his name, or the printing of his name by the use of a stamp, at the foot of such an instrument is an effectual signing thereof by him the same as if he wrote his name there with pen and ink. There are decisions of the courts holding that a binding signature to a written contract may be so made by a party thereto, where the name of the party so appended to the writing is placed there with intent on his part to make it his signature to the contract. The fallacy of counsel's contention here made is found in the facts that the words "Times Square Garage, By, Vendor," negatives the idea that they were placed at the foot of the instrument as the signature of the Times Square Garage. Indeed, taken in connection with the instrument as a whole, these words, and the form in which we find them, indicate plainly that they were placed there merely as a part of the drafting of the instrument, and were not intended to constitute a signature until the blank space should be filled in by the one authorized to act for the Times Square Garage in the making of the contract.

In *Jennings v. Schwartz*, 82 Wash. 209, 144 Pac. 39, Judge Fullerton, having under consideration the sufficiency of the signature of the vendor to a conditional sale contract as required by this statute, where there

Dec. 1919]

Opinion Per PARKER, J.

was no signature of the vendor appended at the end of the contract, his name appearing only in the body of the contract, speaking for the court, said:

"It has the elements of a recording act. It will be remembered that, prior to its enactment, unrecorded conditional bills of sale of personal property were valid in this state, not only as between the vendor and vendee, but as to encumbrancers and purchasers without notice, and subsequent *bona fide* creditors of the vendee. It was thus possible for the vendee of such property to commit frauds by disposing of the property to innocent third persons and by using it as a basis upon which to obtain credit. While the statute therefore tends in the same degree to prevent frauds between vendors and vendees through the instrumentality of perjury as does the statute of frauds, its principal if not primary purpose is to prevent the vendor and vendee of such property from committing frauds upon third persons. It would seem then, since it affects persons other than the parties to the agreement, the courts are justified in giving it a more strict construction than it gives to the statute of frauds; that it is proper to require that the instrument when filed shall show on its face a compliance with the statute; that the instrument shall be complete in itself; thus doing away with the necessity of inquiring into extrinsic matters to determine its validity.

"Tested by the more strict rule, we are clear that this memorandum was not signed by the vendor within the meaning of the statute. The instrument would appear no different on its face had it been prepared wholly by the vendee without the knowledge or consent of the vendor. Whether it was signed by the vendor or not was thus subject to dispute, even as between the parties, and the question could only be determined by an examination into their acts and conduct. The rights of third persons should not be left to depend upon such circumstances; as to them, the instrument should be fair upon its face. As this instrument is not thus fair, we hold the sale absolute as to subsequent creditors in good faith."

Our attention is called to the fact that, upon rehearing, that case was differently disposed of by this court *En Banc*, in an opinion found in 86 Wash. 202, 149 Pac. 947, wherein the view is expressed that it was unnecessary to pass upon the validity of the conditional sale contract, as was done by the department in Judge Fullerton's opinion. The opinion of the court *En Banc*, however, does not in the least take issue with the law as expressed in the department opinion upon the construction of the statute touching the signing of the conditional sale contracts. Notwithstanding the department decision did not decide the question which ultimately controlled the final disposition of the case, we are quite convinced that it expresses a correct view of the law therein discussed.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

HOLCOMB, C. J. (dissenting).—Appellant alleged in his amended complaint that, at the time of entering into the conditional sale contract involved herein, he was carrying on business in Seattle, King county, Washington, under the firm name and style of Times Square Garage, and had filed his certificate thereof with the county clerk as required by law. When the name Times Square Garage was appended at the end of the conditional sale contract, the same name was used as was entitled to be used as the business name of appellant, under our law. Any additional marks or name or signature as to the vendor would have been entirely superfluous. The name Times Square Garage was typewritten, not occurring merely in the body of the instrument as vendor, although it did so appear in a number of places, but in the place left for the signatures of parties, the place for the vendee's signature

Dec. 1919] Dissenting Opinion Per HOLCOMB, C. J.

being left above and described as vendee, and that of the vendor being described as vendor; and in every other respect it is conceded that the instrument was so executed as to entitle it to be recorded as a conditional sale contract, and it was so recorded by the vendor within ten days as required by law. This in itself is sufficient to indicate that the vendor adopted the signature at the bottom as it was, without anything additional, and that that was his business signature and all the signature required.

As is pointed out in the majority opinion, the case of *Jennings v. Schwartz*, 82 Wash. 209, 144 Pac. 39, was finally decided by the court *En Banc* (86 Wash. 202, 149 Pac. 947), upon a ground not involving the validity of the vendor's signature, and that case is not controlling. Nor is the reasoning in that case controlling in this, for in that case there was not even a pretended signature by the vendor at the conclusion of the instrument, but his name was only found in the body of the instrument.

The decided weight of the authority is to the effect that the signature may be printed or written, and that, while the statute requires that a memorandum be signed by the person to be charged, it does not require that the signature be in any definite form, and initials, marks, fictitious names, and even rubber stamps, have all been considered a sufficient compliance with the statute. The test in every instance seems to be whether the party or his duly authorized agent has signed the memorandum in such manner as to authenticate the promise. *McCrea v. Bentley*, 154 N. Y. Supp. 174; *Kilday v. Schancupp*, 91 Conn. 29, 98 Atl. 335; *Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.*, 193 Mo. 236, 182 S. W. 1036; Benjamin, Sales (6th ed.), § 256.

The above authorities are all upon the question of sufficient compliance with the statute of frauds as to memorandum in writing to comply with such statutes. If such signatures are good in such cases, they ought, for the same reasons, to be good upon such a contract as this. Moreover, the vendor would not be permitted by this court, if attempt had been made on its part to avoid this contract of conditional sale, to have denied his signature. It would have been enforced against him. Neither he nor the vendee could dispute they signed this instrument. It was signed by both parties and filed under our conditional sale recording statute. If it was, therefore, good as to both parties and was entitled to be filed under our statute; it was good as to third parties when so executed and filed, and respondent, as an innocent third party, cannot complain of lack of notice under the recording act, or of having been misled.

For these reasons, I am compelled to dissent.

ON REHEARING.

[*En Banc*. June 7, 1920.]

PER CURIAM.—Upon rehearing *En Banc* and a careful reconsideration of the whole subject-matter, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

Dec. 1919]

Opinion Per MACKINTOSH, J.

[No. 15519. Department One. December 3, 1919.]

RICHARD D. BAKER, *Appellant*, v. T. M. TENNENT,
Respondent.¹

PARTNERSHIP (87-89)—ACCOUNTING—RIGHT TO—DEFENSES—WANT OF ASSETS. An accounting between partners will not be decreed when there were no assets and no liabilities and no indebtedness due to the plaintiff from the firm or other partner and it would be of no benefit to any one.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 1, 1919, upon granting a nonsuit, dismissing an action for a partnership accounting, tried to the court. Affirmed.

Tucker & Hyland (S. H. Steele, of counsel), for appellant.

Lane & Thompson, for respondent.

MACKINTOSH, J.—The appellant and respondent were engaged in the insurance and brokerage business under the name of Baker-Tennant & Company. As such, they executed to V. L. Prewett, the appellant's mother-in-law, notes in the sum of approximately \$8,000, which money was used in the partnership business and represented a debt of the partnership. In 1913, the partnership sold their insurance business to a corporation and thereafter two or three brokerage deals were completed. The appellant instituted this action for an accounting and settlement of the partnership affairs. The books of the company on their face show a balance due the appellant of \$5,531.63, and an indebtedness to the respondent of \$192.25. The appellant, who kept the partnership books, credited to his personal account the sum of \$6,204.44, the amount of three of the four notes issued to Mrs. Prewett. He

¹Reported in 185 Pac. 576.

testified he did this for convenience, and although the amount of these notes was carried in his account, the account was initialed "V. L. P." to show the amount came from Mrs. Prewett. The total of all these notes was also credited to the personal account of Mrs. Prewett on the books of the partnership. Excluding from the appellant's credits the amount of the three Prewett notes, which were executed by, and were the sole obligation of, the partnership, his account shows an indebtedness to the partnership of \$672.81. The testimony shows there were no outstanding obligations of the partnership except the obligation of Mrs. Prewett, against which the statute of limitations had already run at the time of the trial, and that there were no property or assets of the partnership; that the commissions on the brokerage deals referred to in the plaintiff's complaint were either outlawed or had been fully settled, and that, as to those not settled, the plaintiff had the right, if he so desired, to attempt their collection, although, as stated, the statute of limitations had run against them. Their aggregate amounts were less than \$200. The testimony being in this condition, the trial court found that there was not sufficient evidence to entitle appellant to an accounting, and with this conclusion we agree.

There being, at the time of the trial, no assets in the partnership nor liabilities, and no indebtedness due from the partnership or the respondent to the appellant, the only indebtedness being one to the respondent, and as he is making no claim for relief against the appellant as to this, the appellant is not entitled to an accounting. An accounting will not be had unless there is something in the hands of the defendant due to the plaintiff, and where no relief beneficial to the plaintiff can be granted, a defendant, over his objection, cannot be compelled to enter into an accounting.

Dec. 1919]

Opinion Per MACKINTOSH, J.

Even if there were a small amount of undivided partnership property, the respondent was offering no objection to the appellant taking possession of it and using it for the payment of partnership debts. There will be no accounting without showing that someone, either the appellant or creditors of the partnership, are going to be benefited by it. *Hunt v. Gordon*, 52 Miss. 194; *Rogers v. Sims*, 39 Mo. App. 678; *McKaig v. Hebb*, 42 Md. 234; *Warburton v. Davis*, 123 Md. 225, 91 Atl. 163; *Campbell v. Zabriskie*, 8 N. J. Eq. 738, and 1 C. J. 629. The case of *Green v. Hart*, 27 Ky. Law 970, 87 S. W. 315, holding to the contrary, seems to have been decided against the nearly unanimous weight of authority.

Appellant frankly admits that his object in bringing this action is to secure on behalf of Mrs. Prewett the payment of her notes, although he did not plead or prove that he himself had paid the whole or any part thereof. They therefore remained entirely in the indebtedness of the copartnership. Mrs. Prewett had, at the time this action was begun, the right to have sued the copartnership on its obligation, but the appellant cannot maintain this suit on her behalf.

Under all the facts, the lower court was correct in dismissing the action, and its judgment is affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15606. Department One. December 3, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Lars Christensen, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Ernest M. Card, Judge, et al., Defendants.*¹

COURTS (3, 5) — VENUE (4, 5) — SITUATION OF PERSONAL PROPERTY. Any superior court of the state has general jurisdiction over the subject-matter of an action to foreclose a lien for the construction of a ship, regardless of the situs of the ship, and notwithstanding Rem. Code, § 204, provides that actions involving the title to any specific personal property shall be commenced in the county in which the property is situated; since the venue may be changed by consent, or the objection waived by a general appearance.

APPEARANCE (5)—EFFECT—JURISDICTION ACQUIRED. In an action to foreclose liens upon a ship, brought in the wrong county, a general appearance and participation in a trial without objecting to the venue precludes any right to question the court's jurisdiction and creates the same situation as though the party had consented to a change of venue.

Application filed in the supreme court October 16, 1919, for a writ of prohibition to prohibit the superior court for Pierce county, Card, J., from further proceeding with a cause. Denied.

Christopher Jacobsen, for relator.

W. H. Abel, for defendants.

PARKER, J.—The relator, Christensen, by his original application in this court, seeks a writ of prohibition directed against the superior court for Pierce county and the receiver appointed in an action therein pending against relator, prohibiting further proceedings in that action; relator resting his claim of right to such writ upon the ground that the superior court for Pierce county has proceeded, and is proceeding, in the action without jurisdiction.

¹Reported in 185 Pac. 623.

Dec. 1919]

Opinion Per PARKER, J.

The controlling facts appearing in the record before us may be summarized as follows: On May 23, 1919, the Eureka Cedar Lumber & Shingle Company commenced an action in the superior court for Pierce county under Rem. Code, §§ 1182, 1183, against the Martinolich Shipbuilding Company and Lars Christensen, this relator, seeking foreclosure of its claim of lien upon two uncompleted vessels, for the construction of which it had furnished material. The shipbuilding company, prior to and at the time of the commencement of the action, was constructing the vessels at its shipbuilding plant in King county, for Christensen as the owner, where the ships were in its possession until the possession thereof was taken by the receiver appointed in the action, since which time they have remained in the possession of the receiver at the same place. Both the shipbuilding company and Christensen appeared generally in the action, and thereafter the case proceeded regularly to trial in the superior court for Pierce county upon the merits, not only for the determination of the lien rights asserted by the Eureka Cedar Lumber & Shingle Company, but also for the determination of the lien rights asserted by numerous other claimants, who became interveners in the action. Christensen appeared and participated by counsel in the trial of the case, resisting the claims asserted by the plaintiff and interveners upon the merits, without making any objections of any nature whatsoever to the jurisdiction of the superior court for Pierce county, until at the close of the trial, after the introduction of all the evidence in behalf of all the parties, when counsel for Christensen moved the court for an order and judgment of dismissal of the action upon the ground, among others, that the vessels against which the liens were sought to be foreclosed were,

and had been at all times, situated in King county, and that, therefore, the superior court for Pierce county was without jurisdiction of the subject-matter of the action. This motion was by the court denied, and thereupon, the case being argued upon the merits, judgment of foreclosure was rendered in favor of the Eureka Cedar Lumber & Shingle Company and the interveners, the court embodying in its judgment an order of sale of the vessels to satisfy the several lien claims. That action had reached this stage when this proceeding was commenced in this court.

Counsel for relator, Christensen, invoked the provisions of Rem. Code, § 204, reading as follows:

“Actions for the following causes shall be commenced in the county in which the subject of the action, or some portion thereof, is situated:—

“(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property;

“(2) All questions involving the rights to possession or title to any specific article of personal property; in which last mentioned class of cases damages may also be awarded for the detention and for injury to such personal property.”

It is contended that subdivision 2 of this section has the effect of vesting in the superior court for King county exclusive jurisdiction of the subject-matter of the foreclosure of these lien claims, because of the location of the vessels in that county. We understand counsel for Christensen to mean that the jurisdiction of the subject-matter of the action is exclusively in the superior court for King county, because of the location of the vessels therein, to the exclusion of every other superior court of the state, in the broad sense that no other superior court of the state could,

Dec. 1919]

Opinion Per PARKER, J.

under any circumstances, rightfully entertain jurisdiction over the subject-matter of the action, even by consent of the parties thereto. This, in any event, is the real contention that would have to be successfully maintained in behalf of Christensen before the jurisdiction of the superior court for Pierce county could be ousted in the case. It is not a question of any want of jurisdiction over the person of Christensen as a party to the action for want of process, since manifestly that was consented to by him, as evidenced by his general appearance, and by his participation in the trial of the action upon the merits without any objection being made in his behalf as to the manner in which he was brought into the action as a defendant.

Our problem then is, Has each superior court of the several counties of the state jurisdiction over the subject-matter of the foreclosure of liens of this nature, regardless of the particular location within the state of the vessels against which such foreclosure may be sought? We are not here concerned with the question of the acquiring of jurisdiction by a superior court by process or otherwise in a particular pending action, but are concerned with that jurisdiction which the court possesses over the subject-matter, speaking generally, and without reference to any particular pending action. Now, manifestly, there are circumstances under which the action here in question would be determinable in the superior court for Pierce county. This might be done by consent of all the parties thereto by agreeing upon a change of venue of the action from the superior court for King county, had it been commenced in the superior court for that county and jurisdiction of the persons of the parties to the action acquired by that court. This would be true, even conceding that the action be as purely local, as distinguished from tran-

sitory, as an action to foreclose a mortgage upon real property, for, even in such an action, a change of venue may be granted either for cause or by consent of the parties to such action. Rem. Code, §§ 208, 209, 216; *State ex rel. Schwabacher Bros. & Co. v. Superior Court*, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C 814; *State ex rel. Howell v. Superior Court*, 82 Wash. 356; *Shedden v. Sylvester*, 88 Wash. 348, 153 Pac. 1. How, then, can it be said, with any show of reason, that the superior court for Pierce county has not jurisdiction over the subject-matter of the action in that broad sense that it has power to hear and determine such an action? Manifestly the superior court for Pierce county does have jurisdiction over the subject-matter of such an action, otherwise it would have no power to hear and determine the same when transferred to it, either for cause or by consent of the parties, from the superior court of the county within which the vessels sought to be foreclosed against are situated. It seems plain to us that, when Christensen entered his general appearance in the action in the superior court for Pierce county, and participated in the trial thereof upon the merits, without in any manner questioning the jurisdiction of that court to hear and determine the cause until the conclusion of the trial, and without asking that the case be transferred to the superior court for King county, he placed himself in the same position, so far as his right to question the court's jurisdiction is concerned, as if the action had been commenced in King county and by his consent transferred for trial to Pierce county. Plainly the action involved a subject-matter within the jurisdiction of every superior court in this state. Whether or not it was properly brought in the superior court for Pierce county in the first instance, and whether or not Christensen had the right to have it tried in the

Dec. 1919]

Opinion Per TOLMAN, J.

superior court for King county, are not questions upon which Christensen, at this time, is entitled to be heard.

The writ is denied.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15438. Department Two. December 5, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
C. L. Morris, Plaintiff, v. C. V. SAVIDGE, as
Commissioner of Public Lands,
*Respondent.*¹

MINES AND MINERALS (1-A)—LEASE OF MINERAL LANDS—RESERVATIONS. The lessee of state mineral lands is entitled to a lease with all the rights granted by Rem. Code, §§ 6782-6787, as amended by Laws 1917, p. 599; hence the commissioner of public lands is without discretion to reserve to the state the timber and other materials except those granted by the lease.

Application filed in the supreme court June 27, 1919, for a writ of mandamus to compel the commissioner of public lands to issue a lease for state lands for prospecting purposes. Granted.

Kerr & McCord, for relator.

L. L. Thompson, Attorney General, and *Jno. A. Homer*, Assistant, for respondent.

TOLMAN, J.—Petitioner alleges that he has made application, paid the fees fixed by law, and is entitled to a prospecting lease covering a certain eighty-acre tract of land belonging to the state, and that the respondent refuses to issue to him such lease without inserting therein a provision or reservation to the effect that "the state of Washington reserves . . .

¹Reported in 185 Pac. 597.

the right to sell or otherwise dispose of any and all timber and other valuable materials except the minerals which the lessee is hereby authorized to remove, with such rights and privileges for the production, use and removal thereof as may be authorized by law," and also certain reservations as to rights of way, etc., as provided by ch. 109 of the Laws of 1911, p. 506 (Rem. Code, § 6831-1 *et seq.*); though it is admitted on oral argument that these latter mentioned reservations are proper, and we understand that petitioner has waived his objections thereto. A writ of mandate is sought directing the commissioner of public lands to issue the lease in the form proposed by him, excepting only the provisions above quoted.

The land commissioner is without discretion in a matter of this kind. *State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 Pac. 216; *State ex rel. Hall v. Savidge*, 93 Wash. 676, 161 Pac. 471. It therefore seems self-evident that petitioner is entitled to a lease which in its terms grants to him all of the rights which the statute gives him in such cases and without any limitations except those which the statute imposes. The statute clearly authorizes the reservation as to the rights of way; § 1, ch. 109, p. 506, Laws of 1911 (Rem. Code, § 6831-1), but we find nothing in the act or the amendments thereto which forms any basis for the reservation of timber and other materials except minerals. Section 6782, Rem. Code, as amended by ch. 148, Laws of 1917, p. 599, authorizes the issuance of leases and contracts for the mining of precious metals. Section 6783, as amended, provides for the application by any citizen for a prospecting lease to cover not to exceed eighty acres according to the legal subdivisions. Section 6784 provides for the manner of locating such mineral claims. Section 6785, the substance of which is included in the lease offered by respondent, provides

Dec. 1919]

Opinion Per TOLMAN, J.

“the lessee may cut and use the timber found upon said premises for fuel and construction of buildings, required in the operation of any mine or mines on the premises; also the timber necessary for drains, tramways and supports for such mine or mines, and for no other purpose.” Section 6786 provides for the fees, the time the lease shall run, and limits the amount of ore which may be removed while operating under the prospecting lease. Section 6787, as amended, provides that, at any time prior to the expiration of such lease, the leaseholder, or any assignee thereof, shall have the right to obtain from the said commissioner of public lands a contract “to mine the lands covered by said lease and extract and dispose of the minerals taken therefrom.” It then proceeds to vest the commissioner of public lands with discretion to determine whether in fact the land contains minerals, and if so, to execute and deliver the contract to mine; and further provides that the lease, among other things, shall contain the same privileges as to the use of timber as that contained in the quotation from § 6785, given above.

We find nothing in the act or elsewhere reserving or requiring the lease to contain any words of reservation as to timber, and as a consequence must hold that the commissioner of public lands is without authority to insert the reservation complained of. It follows, therefore, that the writ will issue directing the commissioner of public lands to issue and deliver the lease without the reservation quoted, or any reservation as to timber on the land involved.

HOLCOMB, C. J., MOUNT, MITCHELL, and FULLERTON, JJ., concur.

[No. 15456. Department Two. December 5, 1919.]

A. W. MORGAN *et al.*, Respondents, v. VENESS LUMBER COMPANY, Appellant, MICHIGAN TRUST COMPANY *et al.*, Defendants.¹

LOGS AND LOGGING (1).—SALE OF STANDING TIMBER—TIME FOR REMOVAL. A sale of standing timber, with the right to enter from date of the deed until the timber may be cut and removed, requires its removal within a reasonable time; and where it was reasonably convenient to log the land at the date of sale, there was a ready market for logs, and the land was chiefly valuable for agricultural purposes, a finding that twelve years was not a reasonable time is unwarranted.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered January 13, 1919, upon findings in favor of the plaintiffs, after a trial to the court and a jury, in an action for equitable relief. Affirmed.

Hayden, Langhorne & Metzger, for appellant.

Forney & Ponder, for respondents.

TOLMAN, J.—On August 17, 1906, respondents sold and, by written instrument, conveyed all of the timber, except certain cedar, on certain described real estate in Lewis county to one Hill. The deed of conveyance was somewhat informal; was verified instead of being acknowledged, and the portion which is material here reads as follows:

“Together with the rights to enter upon said lands from the date of this instrument until said timber may be removed, to cut and remove said timber, also the right to build all necessary roads and have camp privileges for the removal of said timber. Whenever the party of the second part gets the timber removed from the above described land then he shall have no further rights or privileges on said lands.”

¹Reported in 185 Pac. 607.

Dec. 1919]

Opinion Per TOLMAN, J.

In September following, written additions were made to the contract as follows:

"1st. The ten acre tract exceptions mentioned on line 17 and 18 is intended and understood to be in the northeast corner of the northeast quarter ($\frac{1}{4}$) of said lands.

"2nd. It is also understood and agreed by and between A. W. Morgan, Julia A. Morgan, parties of the first part, and J. D. Hill, party of the second part, that the said party of the second part shall have a right of way across said lands to haul all timber bought in the neighborhood."

which were duly acknowledged, and the contract as thus completed was filed for record October 1, 1906.

Hill conveyed his rights under this contract to appellant in November, 1911. None of the timber having been removed, respondents, on February 18, 1918, began this action, alleging in their complaint the facts heretofore stated, and that the lands involved are valuable for agricultural and pasturage purposes, and valueless to plaintiffs until the timber is removed; that the main inducement for the sale was to have the timber removed within a reasonable time; that it was the intent of all parties that it should be so removed, and because thereof the price to the purchaser was greatly lessened from what it otherwise would have been; that such reasonable time had elapsed and that repeated demands for such removal had been made, all of which had been ignored and compliance therewith refused; that, because thereof, the title to the timber had reverted and the rights of the defendant have been forfeited, and pray for a judgment establishing the forfeiture and quieting plaintiffs' title to the timber united with the land.

A general demurrer to the complaint was interposed and overruled, after which issues were raised by answer and reply, and the case proceeded to trial before

the court with a jury sitting in an advisory capacity. In due time the court submitted to the jury certain interrogatories, which, together with the answers of the jury, are as follows:

“(1) How much timber, approximately, do you find is situated on this land? Approximately 2 to 2½ million ft.

“(2) How far is the nearest part of this land from the Cowlitz river? About $\frac{7}{8}$ of a mile.

“(3) Would it have been reasonably convenient for any practical logger, using the customary appliances and facilities ordinarily used at the date of the sale to Hill in like logging operations, to have logged this timber into the Cowlitz river? Yes.

“(4) Was there a market for such timber as the timber in question on the Cowlitz or Columbia rivers during the period from the date of the timber deed to Mr. Hill and the date when this action was brought? Yes.

“(5) What is the character of the surface of the land on which this timber is situated, whether rugged and broken or comparatively smooth? Rough, rolling land from brow of hill south. Comparatively level land from brow of hill north.

“(6) Would this land be valuable for agriculture and pasturage purposes after the timber was removed? Yes.

“(7) Is this land of any considerable value to plaintiffs with the timber remaining thereon? No.

“(8) Is the land of such a character that it could be logged at any season of the year? Yes.

“(9) How long would it have required a reasonable, practical logger, using the customary appliances and facilities ordinarily used in like logging operations in that vicinity, to have removed this timber? From 3 to 6 months.

“(10) Has a reasonable time elapsed for the defendant, J. A. Veness Lumber Company, and its predecessor in interest, Hill, to have removed the timber in controversy at the time of the commencement of this action on February 18, 1918? No.”

Dec. 1919]

Opinion Per **TOLMAN, J.**

The trial court thereafter made findings of fact and conclusions of law in which he adopted the first nine findings of the jury and rejected the tenth, and a judgment followed establishing respondents' title to the land and timber in accordance with the prayer of their complaint, excepting only a right of way to all timber bought in the neighborhood.

Bringing the case here on appeal, appellant assigns as error the overruling of the demurrer to the complaint, and also raises the point that, under all of the evidence, the judgment should have been for the defendant in accordance with the tenth finding of the jury.

Appellant contends for the application of the rule of strict construction of the deed against the grantors, and argues that, though the deed is silent as to the time within which the timber shall be removed, the contract as worded will not justify the usual conclusion that it was to be removed within a reasonable time; but, on the contrary, if strictly construed, the words used show an intention to permit the grantee to remove the timber at his pleasure, without regard to time. This rule is stated in 8 R. C. L. 1051:

"A deed is construed most strongly against the grantor and in favor of the grantee. This rule has been called one of the most just and sound principles of the law, because of the fact that the grantor selects his own language, and it is statutory in some jurisdictions, as where the statute provides that grants shall be construed like contracts, and contracts shall be construed against the person responsible for any uncertainty. If, therefore, the deed can inure in different ways, the grantee, it is said, may take it in such way as will be most to his advantage. But it has been held that the rule of favor is the last one which courts apply, and ought never to be resorted to so long as a satisfactory result can be reached by other rules of analysis and construction."

The same authority, at page 1038, says:

“In applying the rule of intention, the courts will so construe a conveyance as to give effect to the intention of the parties rather than defeat such intention by a strict technical construction of the form of conveyance adopted or of the words used therein, the estate intended to be conveyed being the main thing, and the conveyance only the instrument by which the transfer is effected; and where the intention of the grantor clearly appears from the face of a deed, effect must be given thereto, however unusual the form of the deed, unless the repugnancy in its clauses is such as to render the deed utterly void.”

The deed under consideration was evidently drawn by a person but little conversant with such a task, as is evidenced by the language employed and the verification in place of an acknowledgment; but notwithstanding that fact, the intent of the parties seems plain, and from the instrument itself and the circumstances surrounding the parties at the time it was made, as pleaded, we are convinced that it falls far short of granting the right of removing the timber at the pleasure of the grantee, but, on the contrary, the trial court correctly applied the rule of reasonable time, and properly overruled the demurrer.

It is generally held that, unless the deed clearly manifests an intention on the part of the grantor to convey a perpetual right to enter upon the land and remove the timber, the purchaser will be allowed only a reasonable time for such removal, and what is a reasonable time is a question of fact dependent upon the circumstances of each case. 25 Cyc. 1553; *Young v. Camp Mfg. Co.*, 110 Va. 678, 66 S. E. 843; *McRae v. Stillwell*, 111 Ga. 65, 55 L. R. A. 513; *Houston Oil Co. v. Boykin* (Tex. Civ. App.), 153 S. W. 1176; *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.*, 148 Ky. 82, 146 S. W. 438, 46 L. R. A. (N. S.) 672; *Liston*

Dec. 1919]

Statement of Case.

v. Chapman & Dewey Land Co., 77 Ark. 116, 91 S. W. 27; *Carson v. Three States Lumber Co.*, 108 Tenn. 681, 69 S. W. 320; *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259.

We have carefully read and considered the evidence, and, in our judgment, it fully justifies the first nine findings of the jury and the findings and conclusions of the trial court; that the demand, if demand be necessary, was ample, and that the necessary elements of estoppel were not established.

There being no error, the judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15485. Department One. December 5, 1919.]

EDWIN CAREY, *Appellant*, v. CHARLES WILSEY *et al.*,
Respondents.¹

PARTNERSHIP (28, 67) — ACQUIRING ADVERSE TITLE — ESTOPPEL — RETIRING PARTNER. Where a partnership agreement for logging certain tracts of lands provided for purchase of the timber at stated prices, and part of the timber on a tract was cut before its purchase, treating the timber as a partnership asset and its price as a liability, a retiring partner is estopped to acquire and assert an adverse title to the timber superior to the rights which he sold to his co-partner upon dissolution of the partnership.

Appeal from a judgment of the superior court for King county, Jurey, J., entered February 3, 1919, upon findings in favor of the defendants, in an action in tort, tried to the court. Affirmed.

Peterson & Macbride, for appellant.

Chas. D. Fullen, for respondents.

¹Reported in 185 Pac. 600.

PARKER, J.—The plaintiff, Edwin Carey, commenced this action in the superior court for King county, seeking recovery of the value of standing timber, claiming to be the owner thereof, which he alleges was cut and appropriated by the defendants Wilsey and Pinney. The principal defense made is that whatever right the plaintiff acquired in the timber was inferior and subject to, and acquired with full notice of, the right of the defendant Wilsey therein. Trial before the court without a jury resulted in findings and judgment against the plaintiff denying him any recovery, from which he has appealed to this court.

The controlling facts may be summarized as follows: Pinney's connection with the matters here in controversy was at all times as agent of Wilsey. In the spring of 1917, Pinney, acting for Wilsey, and William Carey, who is the father of the plaintiff, Edwin Carey, entered into negotiations looking to logging operations by the cutting and marketing of timber then standing upon certain tracts of land situated on Vashon Island, in King county, including the ten-acre tract and the timber thereon here in question, which was then owned by one Frasch. In the spring of 1917, William Carey and Pinney visited the owners of the several tracts and obtained offers from each of them to sell their timber, Frasch agreeing, or at least offering, to sell to them the timber on his ten-acre tract for \$100. Thereafter, William Carey, and Pinney, acting for Wilsey, entered into a written partnership contract looking to the cutting and marketing of the timber standing on these several tracts, in which partnership contract is recited the fact that they had examined the timber standing upon these several tracts, including Frasch's ten-acre tract, and that they could purchase the timber at prices which were therein stated, according to the offers of sale made by the respective owners,

Dec. 1919]

Opinion Per PARKER, J.

including Frasch's offer to sell the timber on his ten-acre tract for \$100. This partnership contract contains an agreement that the partnership would purchase the timber on these several tracts at the prices stated, including the Frasch timber, and also other provisions looking to the partnership cutting and marketing of the timber. It is apparent that the partnership was formed for the express purpose of purchasing, cutting and marketing the timber standing on these several tracts of land, including the timber on the Frasch ten-acre tract. William Carey, being an experienced logger, was to manage the logging operations, while Wilsey, or rather Pinney acting for him, was to manage the business affairs of the partnership, including the marketing of the timber. The logging operations proceeded accordingly under the directions of William Carey.

We may assume that the purchase of the timber upon the several tracts of land, other than that upon the Frasch ten-acre tract, had been consummated by the payment of the purchase price in accordance with the several offers of sale made by the owners. However, during the fall of 1917, or, in any event, before the dissolution of the partnership, which occurred on February 26, 1918, about one-third of the timber standing upon the Frasch ten-acre tract had been cut and appropriated by the partnership, under the direction of William Carey, both partners manifestly proceeding upon the assumption that the understanding with Frasch was such that the partnership had a right to so take the timber, and in doing so, it in no event rendered itself liable to Frasch other than for the \$100 purchase price which Frasch had offered to take for the timber. In other words, we think the offer of Frasch to sell for \$100, the partnership agreement, and the action of the partners thereunder, in which

William Carey was the principal participant, renders it plain that both partners regarded the timber standing upon the Frasch tract as an asset of the partnership, and the \$100 purchase price a liability of the partnership owing to Frasch. On February 26, 1918, the partnership was dissolved by mutual consent, a written contract being entered into between William Carey and Wilsey, Pinney acting for Wilsey, stating the terms of dissolution, which contract by its terms was in effect a transfer by William Carey of all his right, title and interest in and to all of the timber in which the partnership had any interest. Wilsey assumed all the indebtedness of the partnership. Thereafter, on March 8, 1918, William Carey, acting, as he claims, for his son, Edwin Carey, the plaintiff in this action, paid to Frasch \$100 of the son's money, taking from Frasch a receipt therefor, which upon its face purports to convey the timber upon the Frasch tract to the plaintiff. Thereafter this action was commenced by Edwin Carey, seeking recovery from Wilsey and Pinney of the sum of \$900, claimed as the value of the timber belonging to him and taken from the Frasch tract by Wilsey and Pinney.

The theory of counsel for Wilsey and Pinney and of the trial judge, as we understand them, is that, as between the partners, William Carey and Wilsey, William Carey is estopped to deny the partnership ownership of the timber, because of his actions which in effect was a joining by him in the partnership's claim of ownership thereof, by the treating of the timber as an asset of the partnership, and the \$100 purchase price, named by Frasch, as a liability of the partnership owing to Frasch for the timber, and because of his transfer of his interest in the timber to Wilsey, his partner, upon the dissolution of the partnership; and that, since William Carey was acting for

Dec. 1919]

Opinion Per PARKER, J.

his son, Edwin Carey, in the assuming to purchase the timber from Frasch, after the dissolution of the partnership, Edwin Carey is in no better position than William Carey; that is, he is chargeable, by reason of such agency, with full knowledge of all the rights of Wilsey, as against William Carey, acquired under the partnership dissolution contract. We think this is a correct view of the rights of the parties to this action. We do not lose sight of the fact that probably there never was any contract binding upon Frasch to consummate the sale of the timber to the partnership; we are holding only that William Carey has no right to rely upon the want of any such binding contract. He had no right, under the circumstances, to acquire for himself or his son a title to the timber superior to that which he and his partner, Wilsey, were both assuming to possess prior to and at the time of their partnership dissolution contract, which title he conveyed to his partner, Wilsey, upon the dissolution of the partnership.

We think the case does not call for further discussion. The judgment is affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15504. Department One. December 5, 1919.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v.
OTTO MUELLER *et al.*, *Appellants*.¹

PUBLIC LANDS (42) — RAILROAD GRANTS — INDEMNITY AND LIEU LANDS—OPTIONAL RELINQUISHMENT. The railroad company's relinquishment and selection of lieu lands, when the extension of the public survey discloses that settlers are occupying odd sections granted to the company, is entirely optional with the company, under the Wilson act, 30 Stat. at Large 620.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 27, 1918, upon findings in favor of the plaintiff, in an action in ejectment, tried to the court. Affirmed.

L. C. Stevenson and *Harry J. Kuen*, for appellants.

Geo. T. Reid, *J. W. Quick*, and *L. B. da Ponte*, for respondent.

MACKINTOSH, J. — The Northern Pacific Railway Company brought this action of ejectment against the appellants to recover possession of a portion of section 7, township 23 north, range 9, east, located in King county, the property being a portion of the place lands given to the respondent under the act of Congress of July 2, 1864, which provided that every odd section of land within certain limits on either side of the line of the railroad was granted to it in aid of the construction of the road. The appellants settled upon the land in controversy in March, 1905, which was at a time long subsequent to the definite location and construction of the Northern Pacific Railroad. In 1905, this section was unsurveyed. In 1910, the government made a survey of the section in controversy, and on May 7, 1915, the United States duly conveyed and

¹Reported in 185 Pac. 630.

Dec. 1919]

Opinion Per MACKINTOSH, J.

patented the land to the Northern Pacific Railway Company. Subsequent to the government survey, the homestead claim theretofore filed upon the land by the appellants, after due hearing by the land department of the United States, was rejected for the reason that the land lay within an odd-numbered section, and the appellants' homestead claims were cancelled shortly prior to the issuance of the patent to the respondent.

The appellants contend that, having gone upon the land in good faith and made valuable improvements thereon, they, in equity and good conscience, are entitled to protection against the railway company's action to eject them, and that, under a proper interpretation of the acts of Congress relating to the grant to the Northern Pacific Railway Company and the amendments to the original act, including the act of July 1, 1898 (30 Stats. at Large 620), known as the Northern Pacific Adjustment Act, or, more familiarly, as the Wilson Act, the Northern Pacific Railway Company should not be allowed to take this land in place, but should be compelled to select lieu land therefor. An attractive argument is made in this behalf by the appellants; but, the case presenting a question which has already been squarely passed upon by both the Interior department and this court, and titles having been established in accordance with those opinions, we are not now at liberty to disturb what has thus become a rule of property. The Interior department, in the case of *Northern Pac. R. Co. v. Violette*, 36 Land Dec. 182, determined that settlers going upon unsurveyed government land subsequent to the passage of the Wilson Act could not, when it later became established through government surveys that they had settled upon odd sections, compel the selection by the railroad company of lieu lands, the department hold-

ing that, as to settlers subsequent to the passage of the Wilson Act, the railroad company's right of relinquishment was purely optional. The case of *Cameron v. Lyen*, decided by this court in 57 Wash. 384, 106 Pac. 1111, was a case where the defendants had made their settlements in the year 1900, and, within the time prescribed by law and the rules of the land department, offered a filing, which had been refused. In 1903, the lands were surveyed and found to fall within an odd-numbered section; and after the survey, the department, without notice of the defendants' claim, passed the land to patent upon the application of the railway company. Under those facts, which are substantially identical with those in the case at bar, this court said:

"We are cautioned that no court should follow the rule of the department where it conflicts with the equities of the settler. The equities of the settler depend, like the rights of the grantees of the company, upon the act of Congress, and so long as the rules, practice, and decisions of the department accord with the act as we interpret it, and finding no authority to the contrary, we feel bound to give department rulings such weight as they are entitled to. We hold the relinquishment on the part of the company was optional."

Upon the strength of that decision, the judgment of the lower court must be affirmed, and it is so ordered.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

Dec. 1919]

Opinion Per MACKINTOSH, J.

[No. 15516. Department One. December 5, 1919.]

DIMMEN DEN BLEYKER, *Appellant*, v. KING COUNTY
*et al., Respondents.*¹

APPEAL (198)—BOND—SURETIES—COMPETENCY. Upon appeal from a judgment entered against a nonresident plaintiff and the sureties upon his cost bond, an appeal bond with the same sureties is insufficient.

SAME (207)—BOND—AMENDMENT. An appeal bond with part of the appellants as sureties, is not amendable.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 30, 1919, upon granting a nonsuit, dismissing an action in tort. Dismissed.

Elias A. Wright, Sam A. Wright, and Charles L. Westcott, for appellant.

Fred C. Brown, Reeves Aylmore, Jr., and Wm. Parmerlee, for respondent King County.

Shorett, McLaren & Shorett and Edward R. Taylor, for respondents Stuckey.

MACKINTOSH, J.—Dimmen Den Bleyker, the appellant, sued the respondents, King county and A. J. Stuckey and wife, to recover damages for personal injuries sustained as the result of stepping off the edge of a dock. The appellant, being a nonresident of King county, was required to, and did, furnish a nonresident cost bond, with J. J. Hewitt and Frank B. Cole as sureties. At the trial of the case in the superior court, a motion for nonsuit was granted, and judgment of dismissal and for costs in favor of all the defendants was rendered against the plaintiff and

¹Reported in 185 Pac. 613.

against the sureties upon his cost bond. Thereafter the appellant attempted to perfect an appeal to this court, and in that attempt filed his appeal bond, with J. J. Hewitt and Frank B. Cole as sureties thereon, the same parties against whom the judgment below was entered. Respondents have moved this court that the appeal be dismissed for the reason that no appeal bond with sureties as required by law has been furnished or filed.

In *Smith v. Beard*, 21 Wash. 204, 57 Pac. 796, the court said:

“The sureties on this bond are the parties against whom the judgment appealed from was entered, and the fact that they are a surety company does not distinguish them from any of the rest of the judgment debtors. So that, in effect, this is a bond without any surety, and, inasmuch as it purports to be a stay bond and appeal bond both, it is not the bond provided by the statute. This being a matter affecting the substance, and not the form, of the appeal bond, it is a substantial defect, and is not such a defect as must be moved against in the superior court.”

In *David v. Guich*, 30 Wash. 266, 70 Pac. 497, we said:

“The object of an appeal bond is to furnish the respondent with additional security during the pendency of the appeal. The judgment debtors are already bound by the judgment. Their obligation is not increased in any way by the mere formal furnishing of a bond signed by them. Such a bond would be valueless to the respondents, for, after a successful suit upon such bond, they would have nothing but a judgment, which they already have. Hence the bond is utterly worthless, and not in any sense the bond contemplated by the statute.”

So here, the respondents having a judgment against Hewitt and Cole, if they, the respondents, were suc-

Dec. 1919]

Statement of Case.

cessful in this court on hearing the case on the merits and were forced to sue on the purported appeal bond and were successful in such suit, they would have nothing in addition to the judgment which they already have against Hewitt and Cole, and as we said in *David v. Guich*, above, such a bond is worthless.

Appellant claims that, the bond here being not a supersedeas bond but an appeal bond, the rule established in the *Smith* and *David* cases does not apply. However, although the *Smith* case involved a supersedeas and appeal bond, the *David* case involved only an appeal bond, and is therefore strictly in point with the case at bar.

For these reasons, the appeal must be dismissed, and it is so ordered.

HOLCOMB, C. J., MAIN, PARKER, and MITCHELL, JJ.,
concur.

[No. 15573. Department One. December 5, 1919.]

LORENA MILLER, *Appellant*, v. SUPREME TENT OF THE
KNIGHTS OF THE MACCABEES OF THE WORLD,
Respondent.¹

INSURANCE (196) — MUTUAL BENEFIT ASSOCIATION — BY-LAWS — PRESUMPTIONS. The by-laws of a mutual benefit association are binding on all its members, who are conclusively presumed to know them, although adopted subsequent to the contract.

SAME (196). A member of a mutual benefit association who fails to report and pay extra premiums for a more hazardous employment engaged in, thereby changes the amount of his life benefit, where the by-law provides for an increased rate and that, unless the change is reported and extra rate paid, the benefit paid for accidental death shall be \$300 on the basis of a \$1,000 certificate.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Clifford, J., entered March 28,

¹Reported in 185 Pac. 593.

1919, in favor of the plaintiff, in an action on a benefit certificate, upon withdrawing the case from the jury. Affirmed.

J. W. Anderson and *H. W. Lueders*, for appellant.

Ballinger & Hutson, for respondent.

PARKER, J.—The plaintiff, Lorena Miller, seeks recovery upon a benefit certificate issued to her husband, Collins H. Miller, deceased, by the defendant, the Supreme Tent of the Knights of Maccabees, a fraternal benefit association. The cause proceeded to trial in the superior court for Pierce county, sitting with a jury, when, at the close of the introduction of evidence upon both sides, counsel for the defendant moved the court:

“to withdraw the case from the jury and determine, as a matter of law, that the plaintiff, on the evidence, is entitled to a judgment for nine hundred dollars, and no other sum.”

This motion was granted and judgment rendered accordingly. From this disposition of the cause, the plaintiff has appealed to this court.

The benefit certificate sued upon certifies that:

“Sir Knight Collins H. Miller has been regularly admitted as a member at Billings, state of Montana, and that in accordance with, and under the provisions of the laws of the Supreme Tent of the Knights of the Maccabees of the World, he is entitled to all the rights, benefits, and privileges of membership therein, and that at his death one assessment on the membership, not exceeding in amount the sum of three thousand dollars, will be paid as a benefit to Lorena Miller, bearing relationship to him of wife.”

The certificate was issued on March 14, 1902. In the written application of Miller for membership in the association he stated his occupation to be railroad

Dec. 1919]

Opinion Per PARKER, J.

brakeman. Before issuing the certificate, the head officers of the association, desiring to know whether Miller was a passenger or freight brakeman, made inquiry of the local tent at Billings, Montana, and received a card in reply thereto through the mail, purporting to be signed by Miller, stating, over his supposed signature, his occupation to be a passenger brakeman. This information was sought by the head officers manifestly because the occupation of freight brakeman was classed by the laws of the association as hazardous, and called for the payment of fifty cents per month additional dues on each thousand dollars of the life benefit stated in the certificate of membership. There is some dispute as to whether or not the name signed to this statement purporting to have been made by Miller is in fact his signature. We think, however, that will appear, as we proceed, to be of no moment in our present inquiry.

The head officers of the association then proceeded on the assumption that Miller was a passenger brakeman and that he was properly paying dues according to the rates prescribed for such risk, until the change in the laws in 1911, to be presently noticed, after which, as we shall see, it was of no concern to any one but Miller himself which rate he paid, since the amount of his life benefit was thereafter controlled by the rate he paid. From the time of his becoming a member of the association until the time of his death, Miller paid monthly dues to the association of one dollar per month on each one thousand dollars of the maximum of his life benefit of three thousand dollars specified in the certificate of membership, that is, three dollars per month. This was then, and ever since has been, the rate prescribed by the laws of the association to be paid by members of his age employed as passenger brakemen.

At the time Miller became a member of the association, he was employed by the Northern Pacific Railway Company as a brakeman upon a train running regularly over a branch line from Billings to Red Lodge, in Montana, which train was a mixed freight and passenger train. For two years immediately preceding his death, Miller was employed by the company as a yard brakeman, commonly known as a switchman. About ten o'clock at night, on April 17, 1917, Miller was found in a dying condition in the railway company's yard at Auburn, where he was employed, lying on a switch track near the end of a box car which he had a few moments before been seen riding on the top of, evidently with a view to stopping it on the switch track in the making up of a train, it having been detached from the switch engine and proceeded by its own momentum to the point where it stopped, near where Miller was found. His skull was fractured. He died a few hours later. For the present we proceed upon the assumption that the evidence touching the cause of Miller's death showed conclusively that his death was the result of a violent accidental cause, and that the court was warranted in so concluding instead of submitting that question to the jury.

At the time Miller became a member of the association, its laws prescribed, among other things, as follows:

"Hazardous Occupations

"Sec. 416.—The occupations named in this section shall be deemed hazardous, viz.:

"Engineers and firemen employed on all railroads; conductors, brakemen and flagmen in yards or employed on railroad freight trains; switchmen, yardmen . . .

"Extra Rate.

"Provided that all railroad employes hereafter admitted and who may be included in the occupations

Dec. 1919]

Opinion Per PARKER, J.

named in the first paragraph of this section shall pay fifty cents extra on each one thousand dollars of life benefits, based on the table of monthly rates fixed in these laws.

“Change of Occupation.

“Sec. 417.—Members may change occupations, but no benefits shall be paid on account of the death or disability of such member while engaged in any hazardous occupation named herein, unless he has reported such change of occupation and has paid to the record keeper of his tent the extra rate therefor within three days after making such change.”

In the year 1911, the laws of the association were duly changed and the above quoted provisions modified by the following provision:

“Any member who at the time of his admission shall be engaged in, or any member of the association who shall hereafter engage in, any of the occupations enumerated in this section, and who is not paying the extra rate, if his death occurs from accidental causes while engaged in such occupation, howsoever happening, his beneficiary shall receive only such sum as is herein specified to be paid for the particular class of occupation in which the member was so engaged at the time of his death.

“Class 2. Switchmen, the benefit to be paid in case of accidental death being \$300, on the basis of a \$1,000 certificate.”

Miller never notified the officers of the association that he had changed his employment to switchman from that of passenger brakeman, and never offered to pay the additional rate of fifty cents per month per thousand on the maximum benefit specified in his certificate of membership.

It would seem that, had the laws of the association remained unchanged from the time Miller became a member to the time of his death, there could be no recovery upon this certificate in any amount, since there would then have been a complete forfeiture because

of his failure to report the change in his employment to the hazardous one of switchman from that of passenger brakeman, which he claimed, and the association assumed, was his employment when he became a member. This, however, is not our present problem. The association is not claiming forfeiture of the life benefit which Mrs. Miller is entitled to under the certificate, but only claiming that, because of Miller's failure to report the change of his employment and pay the extra rate prescribed by the laws of the association, he thereby voluntarily worked a change in the amount of his life benefit from three thousand dollars to nine hundred dollars, under the laws of the association as amended in 1911. If we are correct in assuming that Miller's death was the result of a personal injury accident, rather than of sickness of some nature apart from personal injury, it seems plain that the trial court in taking the case from the jury and rendering judgment in favor of Mrs. Miller, awarding and limiting her recovery to nine hundred dollars, must be affirmed. It is an elementary beneficiary association law that the laws of such an association are binding upon all its members and all are conclusively presumed to know them. Bacon, *Benefit Societies* (3d ed.), § 81; Niblack, *Benefit Societies* (2d ed.), § 18, 136; 19 R. C. L., page 1198; *Benes v. Supreme Lodge, Knights & Ladies of Honor*, 231 Ill. 134, 83 N. E. 127, 121 Am. St. 304, 14 L. R. A. (N. S.) 540, and note.

It is conceded that the laws of the association, above quoted, were lawfully adopted by the association, and it is plain they constitute as much a part of Miller's contract of insurance as does the certificate itself. There was no evidence introduced upon the trial tending in the least to show facts which would work an estoppel against the association and in favor

Dec. 1919]

Opinion Per PARKER, J.

of Miller, in so far as the binding force and effect of the above quoted laws of the association, as amended in 1911, is concerned. The only claim is that Miller was never furnished a copy of the association's laws and was, in fact, ignorant thereof; but it is not claimed that he could not have had a copy of the association's published pamphlet containing the laws, including those above quoted, by merely asking for one. The amendment of the association's laws of 1911, above quoted, seems to us so plain as to not admit of argument as to its meaning; that is, that Miller, never having paid to the association the extra fifty cents per month per thousand in order to keep his benefit certificate in full force to the maximum of three thousand dollars, after his employment became that of a switchman, he thereby in effect changed the amount of his life benefit from three thousand dollars to nine hundred dollars. The supreme courts of Minnesota and Nebraska have considered this problem presented in almost the exact manner that it is here presented, both courts reaching the same conclusion that we here reach. *Abell v. Modern Woodmen of America*, 96 Minn. 494, 105 N. W. 65, 906; *Modern Woodmen of America v. Talbot*, 76 Neb. 621, 107 N. W. 790.

Some contention is made in appellant's brief that it was erroneous to decide, as the trial court did, that Miller's death was the result of a personal injury accident, instead of submitting that question to the jury. We presume the thought of counsel in this connection is that the jury would have been warranted in finding, under the evidence, that Miller's death was the result of some sickness apart from his injury suffered but a few hours before his death, and that such finding would call for the awarding Mrs. Miller recovery in the sum of \$3,000. We are somewhat at a loss to understand just how counsel for appellant would have

us dispose of the case should we conclude that this contention of theirs is well grounded, for we find in the concluding language of the brief the following:

"We contend that the court committed prejudicial error . . . in withdrawing the case from the consideration of the jury and directing judgment to be entered for \$900 instead of allowing her the amount which the premium paid would purchase for the hazard actually incurred. We respectfully submit that, on the record in this case, the judgment of the lower court must be reversed, a judgment rendered in favor of appellant in the sum of \$2000."

Nowhere in appellant's brief are we asked to award her a new trial, but are thus asked to render a final decision in her favor awarding her two thousand dollars, as a matter of law. The theory of counsel manifestly is that the amount of dues paid by Miller, to wit, three dollars per month, would have purchased a two thousand dollar life benefit, even though he be employed as a switchman, and that we should now decide, as a matter of law, that Mrs. Miller be awarded recovery in that sum. It may be conceded that Miller could have, by the payment of three dollars monthly dues, had the full benefit of a two thousand dollar benefit certificate, even while employed as a switchman; but he never sought to obtain any such a contract from the association, so his contract automatically became, under the last above quoted provision of the laws of the association, as amended in 1911, a life benefit certificate for nine hundred dollars, in the event of his death being the result of an "accidental cause." We are, however, quite convinced that the evidence was such as to compel the finding that Miller met his death as a result of the personal injury accident occurring to him a few hours before his death, and that therefore the trial court correctly so decided as a matter of law.

Dec. 1919]

Opinion Per TOLMAN, J.

Our conclusions reached upon the questions above noticed render it unnecessary to discuss the other questions presented in the briefs of counsel for the appellant, for however we might view them, the judgment of the trial court would have to be affirmed.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15576. Department Two. December 5, 1919.]

FRED VAN BUREN *et al.*, *Appellants*, v.

CHRIS J. PETERSON *et al.*,

Respondents.¹

APPEAL (51)—DECISIONS REVIEWABLE—ORDER VACATING DEFAULT. An order vacating a default judgment is not appealable.

JUDGMENT (34)—DEFAULT—PROOF. The taking of proof *ex parte* after default does not make the judgment other than one by default.

Appeal from an order of the superior court for Lincoln county, Sessions, J., entered May 2, 1919, vacating a default judgment, after a hearing before the court. Dismissed.

Freece & Pettijohn and *S. H. Cutting*, for appellants.

Cannon & Ferris, for respondents.

TOLMAN, J.—This is an action in unlawful detainer; complaint and summons, the latter in special form, requiring an appearance on or before November 28, 1917, were duly served upon respondents. On the return day respondents, through their attorneys, appeared and served a demurrer to the complaint upon appel-

¹Reported in 185 Pac. 572.

lants' attorneys, who duly noted the same for hearing on December 11, 1917. At the time of hearing, the demurrer had not been filed, nor any appearance of record made by respondents. The court made an order requiring respondents to appear and file their demurrer forthwith, which was duly served, but was not complied with, and on January 10, 1918, the default of the respondents for failure to appear was duly entered; proof was taken in open court, findings and conclusions were made and a judgment entered in favor of appellants, authorizing a writ of restitution to issue. Thereafter, on June 8, 1918, respondents served their petition to vacate the judgment and for leave to file an answer and cross-complaint, which petition was heard and granted on April 28, 1919, and thereafter respondents filed an answer and cross-complaint. Appellants perfected an appeal from the order vacating the judgment and granting leave to file an answer and cross-complaint, and respondents now move to dismiss the appeal upon the ground that the order complained of is not an appealable order.

The law is well settled by a long line of decisions of this court that an order setting aside a judgment by default is not appealable, because the policy of the law is to avoid a multiplicity of appeals and relegate the party aggrieved, so far as possible, to but one appeal after final judgment, which brings up for review all orders made in the action, thus avoiding needless delays which frequently amount to a denial of justice, saving expense to litigants, and relieving the courts of useless and unnecessary labor. The subject was fully discussed in *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78, and the reasons against the rule were ably presented in a dissenting opinion by Judge Fullerton, concurred in by Judge Mount, since which time it has

Dec. 1919]

Opinion Per TOLMAN, J.

been generally followed, though attempts to show exceptions to the rule have not been infrequent.

Upon one of these exceptions, *Burke v. Northern Pac. R. Co.*, 80 Wash. 188, 141 Pac. 364, appellants base their defense to the motion. It appears, however, in the *Burke* case, this court found that the order appealed from was one granting a new trial to the plaintiff in the action, and as such was clearly distinguishable.

Notwithstanding the argument of counsel, which closely follows the dissenting opinion in *Nelson v. Denny*, *supra*, we are constrained to hold that the law is too well settled against these contentions to warrant a re-examination of the subject. The taking of *ex parte* proof after the default upon which to base the judgment does not make the judgment other than one by default.

The motion must be granted and the appeal dismissed. It is so ordered.

HOLCOMB, C. J., MOUNT, MITCHELL, and FULLERTON, JJ., concur.

[No. 15102. Department One. August 5, 1919.]

JOHN R. MILLER, *Respondent*, v. GEORGE B. BRANCH *et al.*, *Appellants*.¹

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 22, 1918, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action by a partner to recover money advanced to the partnership. Reversed.

Parr & Marts, for appellants.

Thos. M. Vance, for respondent.

PER CURIAM.—This case is in all respects like the case of *Miller v. Kemper*, 107 Wash. 274, 181 Pac. 859. All the questions presented in this case are decided in that case adversely to the contention of respondent. For the reasons therein stated, the judgment is reversed.

[No. 14988. *En Banc*. November 3, 1919.]

P. P. HAINES, *Respondent*, v. COASTWISE STEAMSHIP & BARGE COMPANY, *Appellant*.²

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 30, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee on a vessel. Reversed.

Trefethen & Findley, for appellant.

Silvain & Butler, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, the majority of the court adhere to the opinion heretofore filed herein as reported in 104 Wash. 685, 177 Pac. 648, and the judgment below is therefore reversed and remanded.

¹Reported in 182 Pac. 732.

²Reported in 185 Pac. 583.

INDEX

Abandonment:

Of railroad, liability on covenant, see RAILROADS, 1.

Abatement and Revival:

Judgment as bar in another action, see JUDGMENT, 24.

1. ABATEMENT AND REVIVAL (10)—ANOTHER ACTION PENDING—DISMISSAL. Where a former action for breach of promise based on a prior promise was dismissed by stipulation although defendant withheld the stipulation from the files, its pendency cannot be pleaded in bar of a subsequent action based upon a promise made after the settlement of the first action. *Bundy v. Dickinson*... 52

Abstracts:

Chattel mortgage on abstract books, see CHATTEL MORTGAGES, 3, 5.

Acceptance:

Of goods sold within statute of frauds, see FRAUDS, STATUTE OF, 2.

Accommodation Paper:

See BILLS AND NOTES, 2.

Accord and Satisfaction:

Relinquishment of rights and claims, see RELEASE.

Account:

Accounting by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 5.

Accounting by guardian of infant, see GUARDIAN AND WARD, 3.

Between partners, see PARTNERSHIP, 2.

Accrual:

Of liability on indemnity bond, see INDEMNITY, 2.

Of right of action, see LIMITATION OF ACTIONS.

Acknowledgment:

Operation and effect of admissions as evidence, see EVIDENCE, 6.

Action:

See MECHANICS' LIENS.

Pendency of action, see ABATEMENT AND REVIVAL, 1.

Breach of promise of marriage, see BREACH OF MARRIAGE PROMISE.

Action—Continued.

- Foreclosure of mortgage, see CHATTEL MORTGAGES, 5.
- Equitable action, see COSTS, 3.
- Against county, limitations, see COUNTIES, 4-6.
- Garnishment proceedings, see GARNISHMENT.
- Establishment of highways, see HIGHWAYS, 1.
- Injuries from defect or obstruction in highways, see HIGHWAYS, 5, 6.
- On contract of indemnity, see INDEMNITY.
- On insurance policy, see INSURANCE.
- Default, see JUDGMENT, 1.
- Bar by former adjudication, see JUDGMENT, 2, 3.
- Unlawful detainer of leased premises, see LANDLORD AND TENANT, 4-7.
- Limitation of statute, see LIMITATION OF ACTIONS.
- For salary of officers, see LIMITATION OF ACTIONS.
- By servant for personal injuries, see MASTER AND SERVANT.
- For injuries from automobiles on streets, see MUNICIPAL CORPORATIONS, 5-9.
- Misjoinder of causes of action as ground for demurrer, see PLEADING, 4.
- Election between causes of action or defenses, see PLEADING, 10.
- By or against principal and agent, see PRINCIPAL AND AGENT.
- Injuries from accident at crossings, see RAILROADS, 5-7.
- Recovery of price paid for goods, see SALES, 4.
- Breach of warranty, see SALES, 5, 6.
- Against school districts, see SCHOOLS AND SCHOOL DISTRICTS, 4.
- Remedies of taxpayers for erroneous assessments, see TAXATION.
- Delay or error in transmission and delivery of telegram, see TELEGRAPHS AND TELEPHONES.
- Recovery of price paid for land, see VENDOR AND PURCHASER, 4.

1. ACTIONS (23)—JOINDER OF CAUSES—"SAME TRANSACTION." A cause of action for an assault and battery upon a grocer while entering the defendant's apartment house to deliver goods does not arise out of the "same transaction," within Rem. Code, § 296, and therefore cannot be united with a cause of action to enjoin interference with plaintiff's right of entry. *Konick v. Champneys*..... 35

Adjoining Landowners:

See BOUNDARIES.

Adjudication:

Operation and effect of former adjudication, see JUDGMENT, 2, 3.

Administration:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.
Of estate of ward, see GUARDIAN AND WARD.

Admiralty:

Jurisdiction, see MASTER AND SERVANT, 1.

Admissions:

As evidence in civil actions, see EVIDENCE, 6.
In pleading, see PLEADING, 2.
Stipulation, see STIPULATIONS.

Adoption:

1. ADOPTION (11)—INHERITANCE BY ADOPTED CHILD—SISTERS. Under Rem. Code, § 1699, divesting natural parents of all legal rights and obligations in respect to an adopted child, and providing that the child shall be to all intents and purposes the legal heir of the adopter and entitled to all the rights and privileges of a natural child, an adopted child has the right to inherit from a brother or sister by adoption, in view of a liberal construction of the statute. *In re Masterson's Estate*..... 307

Adverse Possession:

1. ADVERSE POSSESSION (25) — EXTENSION TO FENCES. Although a fence was erected under a mistake of fact as to the true location of the boundary, exclusive possession under claim of right to such fence for seventeen years ripens into title by adverse possession. *Alverson v. Hooper*..... 510

Adverse Title:

Acquisition by partner, see PARTNERSHIP, 1.

Agency:

See PRINCIPAL AND AGENT.

Aggrieved Person:

Guardian's right to appeal, see APPEAL AND ERROR, 2.

Agreement:

See CONTRACTS.

Alimony:

In action for divorce, see DIVORCE.

Allowance:

To surviving wife, see EXECUTORS AND ADMINISTRATORS, 3.

Alteration:

Of boundaries, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Amendment:

Bond or undertaking on appeal, see APPEAL AND ERROR, 5.
Of pleading, see PLEADING, 5-8.

Annual:

Appointment, see DEPOSITARIES.

Answer:

In pleading, see PLEADING, 1, 8.

Appeal and Error:

Criminal prosecutions, see CRIMINAL LAW, 6.

From decision of county superintendent, see SCHOOLS AND SCHOOL DISTRICTS, 3.

III. DECISIONS REVIEWABLE.

1. APPEAL (51)—DECISIONS REVIEWABLE—ORDER VACATING DEFAULT. An order vacating a default judgment is not appealable. *Van Buren v. Peterson* 697

IV. RIGHT TO APPEAL.

2. APPEAL (88)—RIGHT TO APPEAL—PERSONS AGGRIEVED—GUARDIANS. The guardian of an insane person has such a representative interest as to be an "aggrieved" party, entitled, by Rem. Code, § 1716, to appeal from an order discharging him from his trust as guardian. *In re Bayer's Estate*..... 565

V. PRESERVATION OF GROUNDS.

3. APPEAL (135) — OBJECTIONS—JUDGMENT. The failure to include interest in a judgment cannot be raised for the first time in the supreme court. *Petersen v. Pacific American Fisheries*..... 63

VII. REQUISITES FOR TRANSFER OF CAUSE.

4. APPEAL (198)—BOND—SURETIES—COMPETENCY. Upon appeal from a judgment entered against a nonresident plaintiff and the sureties upon his cost bond, an appeal bond with the same sureties is insufficient. *Den Bleyker v. King County*..... 687
5. SAME (207)—BOND—AMENDMENT. An appeal bond with part of the appellants as sureties, is not amendable. *Den Bleyker v. King County* 687

VIII. EFFECT OF TRANSFER OF CAUSE.

6. APPEAL (229) — EFFECT OF TRANSFER OF CAUSE—JURISDICTION ACQUIRED—CUSTODY OF MINOR CHILDREN. After appeal taken in a divorce case affecting the custody of children, the supreme court possesses sole power to make orders with reference to their custody; and the superior court will be prohibited from changing the custody through habeas corpus proceedings pending the appeal, where the supreme court, upon considering the merits, finds that the welfare of the children does not demand a change. *State ex rel. Wilkerson v. Superior Court*..... 15

Appeal and Error—Continued.

IX. SUPERSEDEAS.

7. **APPEAL (232)—SUPERSEDEAS—RIGHT TO DISMISSAL—GARNISHMENT.** Upon appeal from the dismissal of the original action in which a garnishment has sequestered funds, the plaintiff is entitled to an order fixing the amount of the supersedeas bond on appeal, in order to maintain the *status quo* and make available the money sequestered by the garnishment. *State ex rel. Pioneer Mining & Ditch Co. v. Superior Court* 183

X. RECORD.

Certifying record on certiorari, see **EMINENT DOMAIN**, 3.

Filing transcript, excuse for delay, see **MUNICIPAL CORPORATIONS**, 3.

8. **APPEAL (267)—RECORD—EVIDENCE—NECESSITY—ALLOWANCE OF AMENDMENTS TO PLEADINGS.** In the absence of the evidence in the record, error or abuse of discretion in treating the pleadings amended to conform to the proofs cannot be reviewed. *Strang v. Person* 503
9. **APPEAL (289)—RECORD—STATEMENT OF FACTS—SERVICE OF COPY—NECESSITY.** Under Rem. Code, §§ 389, 393, the failure to serve a statement of facts until after the expiration of the time limited is fatal to its consideration. *Swanson v. Stubb*..... 170
10. **SAME (289).** Under Rem. Code, § 1730-8, an appellant failing to serve a statement of facts within the time limited, must apply to the supreme court for leave to supply the same, upon a showing that such failure was excusable. *Swanson v. Stubb*..... 170
11. **APPEAL (316, 317)—BILL OF EXCEPTIONS—CERTIFICATE AS TO ALL THE EVIDENCE.** In the absence of a statement of facts certified to contain all the evidence, it cannot be said that the superior court abused its discretion in awarding the custody of children in a divorce action, or in refusing to modify the order, upon hearing an application considered to give opportunity for further evidence. *Downing v. Downing*..... 12

XVI. REVIEW.

Error in instructions cured by other instructions, see **TRIAL**, 8.

12. **APPEAL (384)—REVIEW—COPARTIES—FAULT OF COPARTY.** Error in admitting evidence by a codefendant, over the objection of both plaintiff and defendant, may be assigned for reversal of plaintiff's judgment, although she was not responsible for the error. *Bullock v. Yakima Valley Transportation Co.*..... 413
13. **APPEAL (389)—PLEADING (189, 211)—VARIANCE—PREJUDICIAL EFFECT.** In an action for the value of fruit shipped by defendant, a variance between an allegation that plaintiff turned over exclusive

Appeal and Error—Continued.

- control of the fruit to defendant and proof that the plaintiff retained control and power of disposition, is not fatal, where defendant was apprised thereof at the beginning of the trial and did not claim surprise or ask a continuance. *Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*..... 265
14. APPEAL (433)—HARMLESS ERROR—FAVORABLE TO APPELLANT. In an action to recover substantial damages, error in instructing that nominal damages can be recovered if there was a breach of the contract and no substantial damages proven, is error favorable to the plaintiff of which he cannot complain. *Heitmiller v. Prall*.. 382
15. APPEAL (445, 456) — HARMLESS ERROR — ARGUMENT OF COUNSEL. Error cannot be predicated upon impropriety in argument of counsel that was corrected by prompt and adequate instructions. *Pallis v. Kusumi* 641
16. APPEAL (448, 449)—REVIEW—HARMLESS ERROR. Error in the form of a question permitting experts to state the amount of prospective profits is not prejudicial where it appears that they estimated the profits at the difference between the contract price and what it would cost to perform the contract. *Bromley v. Heffernan Engine Works* 31
17. APPEAL (449)—HARMLESS ERROR—EXCLUSION OF EVIDENCE. The exclusion of oral evidence as to the existence of a corporation, while erroneous, is not prejudicial where it was wholly immaterial. *Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*. 265
18. APPEAL (456)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY INSTRUCTIONS. In an action for breach of promise, error in receiving evidence of prior promises made while plaintiff was a married woman is cured by instructions that, to recover, plaintiff must show the promise relied upon after she obtained her divorce. *Bundy v. Dickinson*..... 52
19. APPEAL (464)—HARMLESS ERROR—INSTRUCTIONS—REFUSAL OF REQUESTS. The refusal of an untimely oral request to instruct that mere slipperiness of the sidewalk does not constitute negligence is not prejudicial where other instructions correctly stated the city's duty and confined the jury to the negligence alleged. *Hanson v. Seattle* 586

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

20. APPEAL (483)—DECISION—EFFECT ON STRANGERS—RELIEF TO TAXPAYERS AS CLASS. In an action by a taxpayer to recover excess county taxes paid, in which there is sought on behalf of all other taxpayers a perpetual injunction against the expenditure of the amount of excess taxes collected, the relief will be confined to repayment of plaintiff's excess taxes, where no injunction was issued,

Appeal and Error—Continued.

the year for which the taxes were levied has long since expired, and there was no means of knowing the circumstances under which the several taxpayers paid the excess levy. *Great Northern Railway Co. v. Stevens County*..... 238

Appearance:

1. APPEARANCE (5)—EFFECT—JURISDICTION ACQUIRED. In an action to foreclose liens upon a ship, brought in the wrong county, a general appearance and participation in a trial without objecting to the venue precludes any right to question the court's jurisdiction and creates the same situation as though the party had consented to a change of venue. *State ex rel. Christensen v. Superior Court*. 666

Application:

For appointment of administrator, see EXECUTORS AND ADMINISTRATORS, 2.

For change of venue in civil actions, see VENUE.

Appointment:

See DEPOSITARIES.

Of corporate officers and removal, see CORPORATIONS, 6.

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Apportionment:

Of costs, see COSTS, 1-3.

Appropriation:

For relief, power of legislature, see CONSTITUTIONAL LAW, 3.

For state expenses, requisites, operation and effect, see STATES, 2.

Approval:

Of account, effect, see EXECUTORS AND ADMINISTRATORS, 5.

Argument of Counsel:

Harmless error in, see APPEAL AND ERROR, 15.

Army and Navy:

1. ARMY AND NAVY—RELIEF ACT — EVICTION — DISCRETION — FEDERAL STATUTE. Under the military and naval relief act providing that there shall be no eviction of defendants from a dwelling where the monthly rental does not exceed \$50, except on leave of court which in its discretion may stay proceedings for three months, the court exercises its discretion under the act where it suspended the writ of restitution for more than three months and then upon the trial decided that the writ should issue. *Gilluly v. Hawkins*..... 79

Assault and Battery:

1. **ASSAULT AND BATTERY (2)—PLEADING—COMPLAINT.** A complaint for assault and battery states a cause of action where it alleges that the owner of an apartment house wantonly and unlawfully assaulted and beat the plaintiff, a grocer, when he attempted to make delivery of goods sold to the defendant's tenant. *Konick v. Champneys*.. 35

Assessment:

Of compensation for property taken for public use, see **EMINENT DOMAIN**.

For public improvements, see **MUNICIPAL CORPORATIONS**, 2-4.

Of tax, see **TAXATION**, 1.

Assets:

Of dissolved corporation, see **CORPORATIONS**, 2.

Assignments:

Of rent, see **LANDLORD AND TENANT**, 2.

Associations:

Mutual benefit insurance associations, see **INSURANCE**.

Assumption:

Of risk by employee, see **MASTER AND SERVANT**, 5, 6, 16.

Attorney and Client:

Compensation of attorney, validity of contract, see **DRAINS**, 3.

Fees of, see **GUARDIAN AND WARD**, 3.

Authority:

Of corporate officers or agents, see **CORPORATIONS**, 7.

Of agent, see **INSURANCE**, 1-3; **PRINCIPAL AND AGENT**, 2-6.

Automobiles:

Licenses, proof by copy, see **CRIMINAL LAW**, 2.

Care required of driver, see **MUNICIPAL CORPORATIONS**, 5-9.

Award:

Of industrial insurance, see **MASTER AND SERVANT**, 7-11.

Bail:

1. **BAIL (6)—DISCHARGE.** Forfeiture of a bail bond cannot be defeated for duress and want of consideration, where the information under which the principal was arrested and held charged a crime and he was not entitled to discharge without trial. *State v. Whalen* 287

Banks and Banking:

As depositary, term, see **DEPOSITARIES**.

Bar:

Of action by former adjudication, see JUDGMENT, 2, 3.

Battery:

See ASSAULT AND BATTERY.

Beneficial Associations:

Mutual benefit insurance association, see INSURANCE.

Benefits:

As affecting compensation for appropriation of property, see EMINENT DOMAIN, 1.

Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 2-4.

Bequests:

In general, see WILLS.

Best and Secondary Evidence:

In civil actions, see EVIDENCE, 7.

Bill of Sale:

As chattel mortgage, see CHATTEL MORTGAGES, 1.

Bills and Notes:

Separate and community liability of husband and wife, see HUSBAND AND WIFE, 1.

1. **BILLS AND NOTES (7) — CONSIDERATION — POSTPONEMENT OF DEBT.**
The postponement of an obligation to a future date by the giving of a new note is a new and present consideration for the giving of the note. *Katz v. Judd*..... 557
2. **SAME (9)—CONSIDERATION—ACCOMMODATION PAPER.** The signing of a note as accommodation party, although without receiving consideration, obligates the party on the note. *Katz v. Judd*..... 557
3. **BILLS AND NOTES (136)—CONSIDERATION—EVIDENCE—SUFFICIENCY.**
On conflicting evidence, a finding of consideration for a note given by a corporation is supported by evidence that it was given to secure a current indebtedness for expenses incurred in the company's interest. *Flanagan v. American Minerals Producing Co.*..... 569

Bona Fide Purchaser:

Of mortgaged personal property, see CHATTEL MORTGAGES, 4.

Bonds:

On appeal, see APPEAL AND ERROR, 4, 5.

Bail bonds, see BAIL.

Of indemnity, see INDEMNITY.

Remedies of contractor on city work, see MUNICIPAL CORPORATIONS, 1.

Municipal bonds, see MUNICIPAL CORPORATIONS, 13-16.

Boundaries:

Mistake and extension of possession to boundaries as adverse, see
ADVERSE POSSESSION.

Hearsay as to, see EVIDENCE, 9.

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

1. BOUNDARIES (1)—DESCRIPTION—MONUMENTS AND MARKS. A call in a deed to the south line of a road as then used, which was marked by a fence, being to a monument, controls a description by metes and bounds which would carry it beyond and into the road. *Bullock v. Yakima Valley Transportation Co.*..... 413

Breach:

Of covenants, see COVENANTS.

Breach of Marriage Promise:

Capacity to sue, see PARTIES.

1. BREACH OF MARRIAGE PROMISE (7)—DAMAGES—AMOUNT. Thirty thousand dollars for breach of promise cannot be said to be excessive, where defendant admitted that he was worth \$90,000, especially where he made accusations against the chastity and good character of the plaintiff. *Bundy v. Dickinson*..... 52

Brokers:

Agency in general, see PRINCIPAL AND AGENT.

1. BROKERS (7)—TROVER AND CONVERSION (4)—QUESTION FOR JURY—SALE OF MINING STOCK. A prima facie case of conversion and a question for the jury is made where there was evidence that defendants, as brokers, sold eleven thousand shares of plaintiff's mining stock, falsely representing that they had sold but one thousand shares, and delivered the shares to make good another sale made on the account of another. *Hershey v. Hanauer*..... 498
2. SAME. In such a case, the acceptance by plaintiffs of a return of the shares withheld does not waive the conversion, where the acceptance was conditional and at an agreed price less than its value at the time of the conversion. *Hershey v. Hanauer*..... 498
3. BROKERS (13) — COMPENSATION — PERFORMANCE OF CONTRACT — "SALES PRICE"—FAILURE TO COMPLETE SALE. A broker negotiating a sale of chattels for a commission of five per cent of the "sale price" is entitled to his commission, although the sale was not consummated, where the seller refused to carry out the sale on the terms agreed to. *Evans v. Rublee*..... 174

Building Contracts:

Validity and construction, see CONTRACTS, 1.

Prospective profits, see DAMAGES, 6.

Bonds guaranteeing building contract, see INDEMNITY.

Buildings:

Affected by mechanics' liens, see **MECHANICS' LIENS**.

Burden of Proof:

As to exception from class, see **INTOXICATING LIQUORS**.

By-Laws:

Of mutual benefit societies, see **INSURANCE**.

Calls:

In deeds, see **BOUNDARIES**.

Cancellation of Instruments:

Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 1-3.

Capital:

Of corporations in general, see **CORPORATIONS**, 2-5.

Carriers:

Exclusion from industrial insurance, see **CONSTITUTIONAL LAW**, 3.

Case on Appeal:

Making and settlement, see **APPEAL AND ERROR**, 9, 10.

Certificate:

To statement of facts or bill of exceptions, see **APPEAL AND ERROR**, 11.

Certiorari:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 3, 4.

To review decision of county superintendent, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

Change of Venue:

Of civil actions, see **VENUE**.

Character:

Cross-examination of witness to discredit, see **WITNESSES**, 1.

Charge:

To jury in civil actions, see **TRIAL**, 5-8.

Chattel Mortgages:

1. **CHATTEL MORTGAGES (1)—ABSOLUTE TRANSFER AS MORTGAGE.** A bill of sale to a bank cashier of a donkey engine, purchased for the use of loggers, was not intended as a chattel mortgage to secure the loggers' note for \$300 advanced by the bank, where the agreement gave the makers of the note an option to pay it and take title to the engine, or to pay a sum agreed upon as rental for the engine and take back the note; since there was no obligation to pay the

Chattel Mortgages—Continued.

- note and there could be no security for a debt when there was no debt. *Hays v. Bashor*..... 491
2. CHATTEL MORTGAGES (49)—VALIDITY—STOCK IN TRADE—SALES AND PROCEEDS—RIGHTS OF CREDITORS. A chattel mortgage upon a shifting stock of merchandise, leaving the mortgagors to sell in the course of trade, to be valid as against creditors, should identify the property and must provide for application of the proceeds on the mortgage debt and for accounting and payments; and is void as to creditors where the mortgagors were permitted to dispose of the stock and apply the proceeds to their own use, without making agreed payments on the debt. *Miller v. Scarbrough*..... 646
3. CHATTEL MORTGAGES (49, 50) — RIGHTS AND LIABILITIES — USE BY MORTGAGOR—CONVERSION OR INJURY TO PROPERTY. Notwithstanding a chattel mortgage creates a lien only and conveys no title, a mortgagor of abstract books has no right to impair the security by taking and selling photographic reproductions of the books, in view of Rem. Code, § 1111, giving the mortgagee the right to maintain an immediate action for foreclosure, if there is reasonable cause to believe that the property will be destroyed, lost or removed, and § 3669, making injury to the same a misdemeanor; since making the secret information public must be considered an unlawful destruction of the security. *Wintler Abstract & Loan Co. v. Sears*..... 461
4. CHATTEL MORTGAGES (60) — TRANSFER OF PROPERTY — LIABILITY OF PURCHASER SUBJECT TO MORTGAGE. Where an automobile was sold subject to a chattel mortgage, the purchaser took no greater rights than the mortgagor had, and is not in a position to deny the validity of the mortgage notwithstanding it was not recorded within thirty days in the county to which the automobile had been removed. *First National Bank of Everett v. Northwest Motor Co.*..... 167
5. SAME (78) — FORECLOSURE — SALE — PROPERTY INCLUDED — PHOTOGRAPHIC COPIES OF ABSTRACT BOOKS WRONGFULLY TAKEN. Without deciding whether a chattel mortgage of abstract books covers photographic reproductions unlawfully taken by the mortgagor and sold to a third person, a decree of foreclosure and sheriff's sale particularly describing the books only, does not pass title to the copies, or authorize a possessory action to recover the copies. *Wintler Abstract & Loan Co. v. Sears*..... 461

Child:

See GUARDIAN AND WARD.

Adoption of, see ADOPTION.

Custody of children pending appeal, see APPEAL AND ERROR, 6.

Cities:

See MUNICIPAL CORPORATIONS.

Civil Remedies:

Due process in, see CONSTITUTIONAL LAW, 4.

Civil Rights:

Protection of vested rights, see CONSTITUTIONAL LAW, 1.

Denial of equal protection of the law, see CONSTITUTIONAL LAW, 3.

Claim and Delivery:

See REPLEVIN.

Claims:

Against county, see COUNTIES, 3-6.

Mining claims, see MINES AND MINERALS.

Against municipal corporations, see MUNICIPAL CORPORATIONS, 17.

Collection of Debts:

By agent, see PRINCIPAL AND AGENT, 3.

Collision:

Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 5-9.

Injuries to traveler at railway crossing, see RAILROADS, 5-7.

Commerce:

1. COMMERCE (1)—REGULATION — POWERS OF STATE — EXCLUSION BY FEDERAL CONTROL—TELEGRAPH COMPANIES. Congress, by 36 U. S. St. at Large, p. 539 (U. S. Comp. St. 1913, §§ 8581, 8583), making telegraph companies common carriers and applying the interstate commerce act to them, has occupied the entire field and taken complete control of telegraph companies to the exclusion of state laws, which are superseded. *Rasher-Kingman-Herrin Co. v. Postal Telegraph-Cable Co.* 543

Commissions:

Of broker, see BROKERS, 3.

Community Property:

In general, see HUSBAND AND WIFE.

Compensation:

Of broker, see BROKERS, 3.

For property taken for public use, see EMINENT DOMAIN.

Competency:

Of evidence in civil actions, see EVIDENCE, 4, 5.

Compromise and Settlement:

Relinquishment of right or claim by release thereof, see RELEASE.

Conclusiveness:

Of pleading, see PLEADING, 1.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Conditional Sales:

See SALES, 7-12.

Of property to be resold to city, see MUNICIPAL CORPORATIONS, 1.

Conditions:

Precedent to action against county, see COUNTIES, 4-6.

Subsequent, in right of way grant, see COVENANTS.

In deed as raising implied covenant, see COVENANTS.

Precedent to action for damages against city, see MUNICIPAL CORPORATIONS, 17.

In grant of right of way for railroad, see RAILROADS, 1.

In devise, see WILLS, 1, 2.

Conflict of Laws:

Presumptions as to laws of other countries, see EVIDENCE, 1.

Necessity of proving laws of other state, see MASTER AND SERVANT, 8

Consideration:

For bail bond, see BAIL.

Of bill of exchange or promissory note, see BILLS AND NOTES.

Of fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Constitutional Law:

Limit of issue of municipal bonds, see MUNICIPAL CORPORATIONS, 13-16.

Constitutional prohibition against compelling witness to incriminate himself, see WITNESSES, 2.

1. CONSTITUTIONAL LAW (68)—VESTED RIGHTS—RIGHT OF ACTION IN TORT. As the right to sue a school district in tort rests in statute, it is not a vested right of property; hence Laws 1917, p. 332, repealing the law, is not unconstitutional in depriving a child of his former right of action for injuries sustained on playgrounds prior to the enactment of the law. *Bailey v. School District No. 49*. 612
2. CONSTITUTIONAL LAW (70)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATION—RELIEF BILLS—VALIDITY. The courts will not inquire into the constitutionality of Laws 1919, p. 299, making an appropriation for the relief of certain persons for services performed and material furnished to the state, although it is alleged that the act grants extra compensation for the performance of services under state contracts after performance of the contracts, in violation of Const., art 2, § 25, and although fraud is alleged; since the courts

Constitutional Law—Continued.

- cannot inquire into the motives of the legislature, or question the facts or impeach the judgment of a coordinate branch of the government. *State ex rel. Govan v. Clausen*..... 133
3. CONSTITUTIONAL LAW (103)—EQUAL PROTECTION OF LAWS—WORKMEN'S COMPENSATION ACT. Laws of 1917, p. 96, § 19, excluding employees of carriers engaged in interstate and intrastate commerce from the operation of the industrial insurance act and giving them the right to institute actions for personal injuries, does not deny the equal protection of the laws guaranteed by the 14th amendment of the Federal Constitution; since it was not the object to take from the states the right to classify the subjects of legislation where the classification is not arbitrary or unreasonable. *Archibald v. Northern Pac. R. Co.*..... 97
4. CONSTITUTIONAL LAW (136) — DUE PROCESS — CIVIL REMEDIES — FINALITY OF ALLOWANCE TO WIDOW. Laws of 1917, p. 670, § 103, providing that a judgment awarding an allowance for the support of a widow shall be conclusive and final, except on appeal and except for fraud, and limiting parties to an appeal from the award, is not an attempted deprivation of property without due process of law. *In re Hamilton's Estate*..... 326

Contempt:

Disobedience of order for alimony, see DIVORCE, 2.

Contest:

Of wills, see WILLS, 1.

Contractors:

Remedies on bonds for public work, see MUNICIPAL CORPORATIONS, 3.

Contracts:

See JOINT ADVENTURES.

Consideration for bills or notes, see BILLS AND NOTES.

Promise of marriage, see BREACH OF MARRIAGE PROMISE.

Compensation of broker, see BROKERS, 3.

Covenants in deeds, see COVENANTS.

Elements of damages, see DAMAGES.

Of drainage district, see DRAINS, 3.

For construction or repair of roads, see HIGHWAYS, 2-4.

Of husband or wife, see HUSBAND AND WIFE.

Insurance contracts, see INSURANCE.

Leases, see LANDLORD AND TENANT.

For sale of mine, see MINES AND MINERALS.

Implied authority of agents to make contracts, see PRINCIPAL AND AGENT, 2, 4.

Release of rights, see RELEASE.

Sales of personalty, see SALES.

Contracts—Continued.

By correspondence, see SALES, 1.

Stipulation in actions, see STIPULATIONS.

Sale of land, see VENDOR AND PURCHASER.

Rescission of sale of land, see VENDOR AND PURCHASER, 1-3.

1. **CONTRACTS (101) — CONSTRUCTION — EXTRAS.** In an action on a subcontract, requiring performance "in strict accordance" with the general contract, which plainly provided for bronze window casings, plaintiff cannot claim that his contract provided for galvanized iron, and that the bronze constituted an extra. *Wiffenbach v. Puget Sound Bridge & Dredging Co.*..... 455
2. **CONTRACTS (174)—ACTIONS FOR BREACH — PLEADING — ILLEGALITY.** In an action upon a contract which is, upon its face, void and unenforceable, as a matter of law, the defendant may invoke its invalidity as a defense without specially pleading it. *Williams v. Great Northern Railway Co.*..... 344

Contributory Negligence:

Of driver of automobile at railroad crossing, see RAILROADS, 7.

Conversion:

By broker, evidence of, see BROKERS, 1, 2.

By mortgagor, see CHATTEL MORTGAGES, 3, 5.

Conveyances:

Of personalty as security for debt, see CHATTEL MORTGAGES.

In general, see DEEDS.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Landlord's reversionary interest, see LANDLORD AND TENANT, 2.

Corporations:

Evidence as to existence, harmless error in, see APPEAL AND ERROR, 17.

Conversion of stock by broker, see BROKERS, 1, 2.

Fraud in representing solvency of, see FRAUD, 2.

Railroad companies, see RAILROADS.

1. **CORPORATIONS (17)—EVIDENCE OF EXISTENCE.** The existence of a corporation may be shown by parol evidence. *Umpqua Valley Fruit Union v. North Pacific Fruit Distributors*..... 265
2. **CORPORATIONS—DIVIDENDS—ASSETS OF DISSOLVED CORPORATION.** The assets of a dissolved corporation, authorized by the board of directors to be distributed according to law, are not a dividend, but are capital assets. *Rosst v. Rex Consolidated Mining Co.*..... 296
3. **SAME (55) — STOCK TRANSFERS — RIGHT TO DIVIDENDS.** Where a contract for the sale of shares of stock was placed in escrow and no reservation of dividends made by the vendor, the dividends ac-

Corporations—Continued.

- cruing to the stock while in escrow belong to the vendee. *Rossi v. Rex Consolidated Mining Co.*..... 296
4. CORPORATIONS (57)—STOCK—TRANSFERS—CONTRACTS—ACTIONS. It is no defense to an action for a refund due the buyer of mining stock that, after its purchase, he received more than the purchase price from a third person upon a forfeited option given on the stock, since that was his own affair. *Abercrombie v. Cullen*..... 515
5. CORPORATIONS (66)—STOCK—TRANSFER—RIGHTS OF CREDITORS. An assignment of stock was shown to be as collateral security for a loan and not a sale, and the stock therefore available to creditors of the assignor, where it was made under financial stress to a friend in consideration of advances, and was antedated for the purpose of frustrating creditors, and was not presented to the corporation and the assignor was permitted to vote it as the owner. *Galland Brothers v. Rundel*..... 5
6. CORPORATIONS (115)—OFFICERS AND AGENTS—EMPLOYMENT—REMOVAL. Under Rem. Code, § 3683, authorizing corporations to appoint "officers, agents and servants," to require security of them, and to "remove them at will," the term "servants" includes one employed by a railroad company as a switchman, and is not restricted to employees in a fiduciary capacity. *Williams v. Great Northern Railway Co.*..... 344
7. CORPORATIONS (152) — POWERS—ULTRA VIRES ACTS—ESTOPPEL. In an action on promissory notes made by a corporation, the defense of *ultra vires* is not available where the defendant has accepted and enjoyed the benefit of the services and expenses for which the note was given. *Flanagan v. American Minerals Producing Co.*..... 569

Correspondence:

Contracts by, see SALES, 1.

Costs:

1. COSTS (4, 17)—APPORTIONMENT—EQUITY—DISCRETION. The apportionment of costs in an equitable suit rests in the discretion of the court. *Wiffenbach v. Puget Sound Bridge & Dredging Co.*..... 455
2. SAME (4). A subcontractor's action on a contract for a county building is an equitable one, in which costs may be apportioned, where it seeks a restraining order against the county and involved a long accounting between the parties, and the complaint on its face was in the nature of a lien foreclosure. *Wiffenbach v. Puget Sound Bridge & Dredging Co.*..... 455
3. SAME (8)—PREVAILING PARTY—EXCESSIVE CLAIM. Where plaintiff, in an equitable case, filed an outrageously excessive and fraudulent claim for extras and falsely testified that it was correct, and the

Costs—Continued.

amount allowed him was never disputed, costs are properly awarded in favor of the defendants. *Wiffenbach v. Puget Sound Bridge & Dredging Co.* 455

4. **COSTS—SEPARATE ACTIONS—LIABILITY OF JOINT TORT FEASORS—ELECTION.** Under Rem. Code, § 478, where joint tort feasons are sued in separate actions when they might have been joined in one, the plaintiff makes an election by accepting costs in one action, and cannot recover costs in the other. *Larson v. Anderson*..... 157

Counties:

County roads, see **HIGHWAYS**.

Proceedings for establishment of highways by county board, see **HIGHWAYS**, 1.

Liability for injuries caused by defects in sidewalk, see **HIGHWAYS**, 5, 6.

Action for salary of county officers, see **LIMITATION OF ACTIONS**.

1. **COUNTIES (86)—POWER TO LEVY TAXES.** There is no implied power in counties to levy taxes, but the same exists only by express statutory authorization. *Great Northern Railway Co. v. Stevens County* 238
2. **COUNTIES (86)—TAXATION—LIMITATION—NECESSARY EXPENSES.** Under Rem. Code, § 9213, expressly limiting the levy for county current expenses to eight mills, which is the only authority for the levy of such a tax, a tax in excess of eight mills is invalid, and cannot be sustained upon the theory that the same was required to meet necessary governmental expenses. *Great Northern Railway Co. v. Stevens County* 238
3. **COUNTIES (88-92)—CLAIMS AGAINST COUNTY—DEMAND FOR PAYMENT—SUFFICIENCY.** A claim for personal injuries against a county is not insufficient in that it makes no formal demand for payment, when it was sufficient in all other respects. *Bullock v. Yakima Valley Transportation Co.*..... 413
4. **SAME (90)—ACTIONS ON CLAIMS—LIMITATIONS—REJECTION OF CLAIM.** Under Rem. Code, § 3909, requiring action on a claim against a county to be commenced within three months after rejection of the claim, where the commissioners refused to act within a reasonable time, the claim will be considered rejected as of the time the claimant elected to sue, and the county could not take advantage of its own wrong and claim an earlier rejection barring the right of action. *Bullock v. Yakima Valley Transportation Co.*..... 413
5. **SAME (90, 95)—CLAIMS—REJECTION—PRESUMPTIONS—ACTIONS—REMEDIES.** Under Rem. Code, § 3909, providing that no action shall be commenced against a county until a claim has been presented and disallowed, it will be conclusively presumed, after the commis-

Counties—Continued.

sioners have failed to act within a reasonable time, that they rejected the claim, and claimant may sue at law without resorting to mandamus to force the commissioners to act; and seven months is more than a reasonable time. *Bullock v. Yakima Valley Transportation Co.* 413

6. COUNTIES (91) — CLAIMS — REJECTION — REVIEW. Under the express provision of Rem. Code, § 3909, the remedy by appeal from the county commissioners' rejection of a claim, does not prevent a party from enforcing his claim by direct action in the courts. *State ex rel. Clapp v. Urquhart*..... 299

County Depositaries:

Act as mandatory, see STATUTES, 4.

Courts:

Review of decisions, see APPEAL AND ERROR.
Jurisdiction of lower court after supersedeas and stay of proceedings, see APPEAL AND ERROR, 6.
Judicial power, see CONSTITUTIONAL LAW, 2.
Control over drainage districts, see DRAINS, 2.
Conclusiveness of judgments, see JUDGMENT, 2, 3.
Mandamus to compel performance of official acts, see MANDAMUS.
Admiralty jurisdiction, see MASTER AND SERVANT, 1.
Province of court and jury, see TRIAL, 2-4.

1. COURTS (3, 5) — VENUE (4, 5) — SITUATION OF PERSONAL PROPERTY. Any superior court of the state has general jurisdiction over the subject-matter of an action to foreclose a lien for the construction of a ship, regardless of the situs of the ship, and notwithstanding Rem. Code, § 204, provides that actions involving the title to any specific personal property shall be commenced in the county in which the property is situated; since the venue may be changed by consent, or the objection waived by a general appearance. *State ex rel. Christensen v. Superior Court*..... 666
2. COURTS (38)—RULE OF DECISION—FEDERAL QUESTIONS. The construction of the interstate commerce act as it relates to telegraph companies is primarily a Federal question, upon which the decisions of the United States supreme court are controlling. *Rasher-Kingman-Herrin Co. v. Postal Telegraph-Cable Co.*..... 543

Covenants:

Grant of right of way to railroad company, see RAILROADS, 1.

1. COVENANTS (11) — RAILROADS (18) — GRANT OF RIGHT OF WAY — CONDITIONS—FORFEITURE. To avoid a forfeiture for condition subsequent, the courts are inclined to regard a grant of land to a railroad in consideration of an agreement to operate the road and maintain

Covenants—Continued.

a station, as creating a covenant running with the land, and not a condition subsequent, and consequently privies and successors in interest could maintain an action for damages on breach of the contract. *Scheller v. Tacoma Railway & Power Co.*..... 348

Creditors:

See FRAUDULENT CONVEYANCES.

Rights on transfer of stock, see CORPORATIONS, 5.

Criminal Law:

See LARCENY.

Dying declarations, see HOMICIDE.

Violation of liquor laws, see INTOXICATING LIQUORS.

Mandamus to compel filing of information, see MANDAMUS, 2.

Privilege of accused, see WITNESSES, 2.

1. CRIMINAL LAW (3-1)—STATUTORY PROVISIONS—CREATION AND DEFINITION OF OFFENSES. Rem. Code, § 5561-4, making it a misdemeanor to use any vehicle within the corporate limits of a city of the first class which shall be of such weight as to destroy or permanently injure the surface of the street, is not void for indefiniteness and uncertainty in failing to specifically point out the facts which constitute the offense. *State v. Brown*..... 205
2. SAME (143) — EVIDENCE — DOCUMENTARY EVIDENCE — CERTIFIED COPIES. In a criminal prosecution, a certified copy from the office of the secretary of state of accused's application for an automobile license is admissible, in view of Rem. Code, §§ 5562-5, 5562-6, requiring an application in triplicate, one to be filed with the secretary of state. *State v. Harding*..... 606
3. CRIMINAL LAW (158) — EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS. In a prosecution for homicide by performing an abortion, it is proper to allow physicians to testify, in answer to questions fairly summarizing the facts which the state's evidence tended to prove, that the proximate cause of death was the act of the defendant in introducing a catheter into the uterus of a pregnant woman. *State v. Swartz*..... 21
4. CRIMINAL LAW (197)—INDORSEMENT OF NEW WITNESSES—DISCRETION. It cannot be said to be an abuse of discretion to allow new names to be indorsed on the information seven days before the trial, where the record fails to show the grounds of the application or that any continuance was asked. *State v. Harding*..... 606
5. CRIMINAL LAW (358-1) — HOMICIDE (127) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF WITNESS. In a prosecution for homicide in performing an abortion, it is an abuse of discretion to refuse a new trial for newly discovered evidence tending to show

Criminal Law—Continued.

that the deceased's dying declaration as to defendant's use of a catheter was false and that the mother of the deceased had given false testimony upon a material point, and had she testified to the truth, the jury might have reached a different conclusion. *State v. Swartz* 21

6. CRIMINAL LAW (385)—APPEAL—NECESSITY OF OBJECTIONS—INFORMATION. Objections that an information is duplicitous and too uncertain cannot be first made in the supreme court. *State v. Swartz* 21

Cross-Examination:

See WITNESSES, 1.

Crossings:

Maintenance of sidewalk, see RAILROADS, 2, 3.

Accidents at railroad crossings, see RAILROADS, 5-7.

Current Expense Fund:

See MUNICIPAL CORPORATIONS, 12.

Custody:

Of delinquent child, see INFANTS.

Damages:

Breach of marriage promise, see BREACH OF MARRIAGE PROMISE.

Breach of covenant, see COVENANTS.

Condemnation of property taken for public use, see EMINENT DOMAIN.

For fraud, see FRAUD, 1.

Double damages in unlawful detainer against tenant, see LANDLORD AND TENANT, 7.

Release of claim for damages, see RELEASE.

Breach of warranty of goods sold, see SALES, 5, 6.

1. DAMAGES (15)—BREACH OF CONTRACT—PROSPECTIVE PROFITS. Prospective profits which a builder would have made upon a building contract are not speculative and therefore may be recovered if proven with reasonable certainty. *Bromley v. Heffernan Engine Works* 31
2. DAMAGES (15, 74) — GROUND — LOSS OF PROFITS. Prospective profits can be recovered for the breach of a contract to furnish garbage from defendant's hotel for the fattening of hogs, when proved with reasonable certainty. *Nelson v. Davenport*..... 259
3. DAMAGES (62) — MEASURE OF DAMAGES — INJURIES TO PERSONAL PROPERTY. Plaintiff, whose car was damaged in a collision, is entitled to recover the cost of repairs and for time lost while the repairs were in progress. *Stubbs v. Molberget*..... 89

Damages—Continued.

4. DAMAGES (84) — EXCESSIVENESS—INJURY TO LEG. A verdict for \$10,300, reduced by the court to \$6,300, for injuries sustained by a stevedore is not excessive where his leg was severely crushed and permanently injured and he was unfitted for his occupation. *Lund v. Griffiths & Sprague Stevedoring Co.*..... 220
5. DAMAGES (113) — SALES (152) — LOSS OF PROFITS—EVIDENCE—ADMISSIBILITY. In an action to recover prospective profits from a contract to furnish hotel garbage for fattening stock or feeder hogs, qualified witnesses may testify as to the amount of pork-fat a ton of garbage would produce, that there was a ready market, and feeders easily obtainable, and as to the time it would take on an average to fatten a hog and the expense attached thereto, and the amount of garbage and weight per day taken from defendant's place of business prior to breach of the contract. *Nelson v. Davenport.* 259
6. DAMAGES (118)—BUILDING CONTRACTS—PROSPECTIVE PROFITS—EVIDENCE. Prospective profits upon a building contract, breached by the owner, are sufficiently proven where it appears that the parties contemplated a profit of 10%, and expert witnesses testified that, considering the plans, cost of labor and material, and local conditions, a profit of 10% would have been made. *Bromley v. Heffernan Engine Works* 31
7. SAME (119) — SALES (153) — LOSS OF PROFITS — EVIDENCE — SUFFICIENCY. The prospective profits from a contract to furnish garbage from defendant's hotel for the fattening of hogs for a certain period of time is shown with reasonable certainty by evidence of the plaintiff's profits for preceding months and that there was a dependable market during the term of the contract and that, owing to war conditions during the balance of the term, plaintiff was unable to make a profit with any substitute feed obtainable. *Nelson v. Davenport* 259

Death:

Dying declarations in prosecutions for homicide, see HOMICIDE.

Debt:

Limit of city, as affecting local assessment, see MUNICIPAL CORPORATIONS, 4.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

On appeal, see **APPEAL AND ERROR**, 20.

Declarations:

As evidence in civil actions, see **EVIDENCE**, 8.

Dying declarations, see **HOMICIDE**.

Deeds:

Evidence of nondelivery, see **EVIDENCE**, 8.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

In deed to railroad to right of way, see **RAILROADS**, 1.

To devisee, delivery, see **WILLS**, 1.

1. **DEEDS—DELIVERY.** Where a deed and will of the same property were made *in extremis* one day before the grantor's death, and it is evident no reservation was made, an immediate delivery of the deed was intended where the grantor stated they were all right and left them with the scrivener without directions as to delivery. *White v. Chellev* 628
2. **DEEDS (15) — DELIVERY—DEED TO PROPERTY DEVISED—EFFECT.** To be valid, a deed by a testator to a devisee must have been delivered in his lifetime; and passes title to the estate at the date of delivery, leaving nothing for the will to operate upon. *White v. Chellev*. 526

Default:

Judgment by, see **JUDGMENT**, 1.

Delinquents:

Custody of, see **INFANTS**.

Delivery:

Of deed, see **DEEDS**.

Time for delivery of goods sold, see **SALES**, 2.

Demurrer:

To pleading, see **PLEADING**, 4.

Depositaries:

Act as mandatory, see **STATUTES**, 4.

1. **DEPOSITARIES — DESIGNATION — ANNUAL APPOINTMENTS—STATUTES.** The designation of a bank as county depositary was intended to continue indefinitely and is not limited to one year, by Rem. Code, § 5072, providing that each county treasurer "shall" annually and at such other times as he deems necessary designate a bank as a depositary for all public funds; since the word "shall" relates to the first designation, while the word "annually" must be read in connection with the words immediately following. *National Surety Co. v. Campbell*..... 596

Depositions:

1. DEPOSITIONS (10) — ADMISSIBILITY OF PART. The adverse party may offer in evidence portions of a deposition where the same relates to a transaction separate from the other transactions stated in the deposition. *Harris v. Saunders*. 195

Descent and Distribution:

See WILLS.

Inheritance by adopted child, see ADOPTION, 1.

Devises:

See WILLS.

To property deeded to devisee, see DEEDS.

Dikes:

Diking districts, see DRAINS.

Diligence:

Affecting right to new trial, see NEW TRIAL, 3.

Disabilities:

Permanent or partial, under workmen's compensation act, see MASTER AND SERVANT, 7, 10.

Discharge:

Of judgment, see JUDGMENT, 4.

From claim for damages, see RELEASE.

Discount:

Sale of bonds at discount, see MUNICIPAL CORPORATIONS, 13-16.

Discretion:

Of juvenile court, see INFANTS.

Discretion of Court:

As to costs, see COSTS, 1, 3.

Indorsement of witnesses at trial, see CRIMINAL LAW, 4.

New trial, see CRIMINAL LAW, 5.

Compelling act within judicial discretion, see MANDAMUS, 1.

New trial, see NEW TRIAL.

Reopening case for further evidence, see TRIAL, 1.

Dismissal and Nonsuit:

Dismissal of other action pending as removal of ground for abatement, see ABATEMENT AND REVIVAL.

Dissolution:

Of garnishment, see GARNISHMENT.

Districts:

Drainage districts, see DRAINS.

Ditches:

See DRAINS.

Dividends:

On corporate stock, see CORPORATIONS, 2, 3.

Divorce:

Capacity of divorced woman to sue for breach of marriage, see PARTIES.

1. DIVORCE (75) — ALIMONY—SUPPORT OF CHILDREN—POWER TO MODIFY. The court has power to modify a decree of divorce awarding the wife the exclusive use of all the property for fifteen years for the support of herself and minor children, upon its appearing that the children had become self-supporting and the necessity no longer existed. *Holter v. Holter*..... 519
2. SAME (86)—DECREE—ENFORCEMENT—CONTEMPT. Failure to obey an order modifying a decree of divorce subjects the party to a judgment for contempt, where the court had jurisdiction and the order was unappealed from. *Holter v. Holter*..... 519

Domicile:

Of decedent as affecting jurisdiction of administration of estate, see EXECUTORS AND ADMINISTRATORS, 1.

Drains:

1. DRAINS (7) — DISTRICTS—POWERS—STATUTES. A diking district organized under Rem. Code, § 4091 *et seq.*, becomes a legal entity as a public corporation, and its commissioners, under §§ 4104, 4122, have discretionary powers which will not be reviewed by the courts in the absence of fraud. *Columbia River Timber & Logging Co. v. Commissioners of Diking District No. 2*..... 148
2. SAME (7)—DISTRICTS—POWERS—CONTROL BY COURTS. There is no sufficient evidence of fraud or arbitrary action by commissioners of a diking district to warrant interference by the courts, where it merely appears that there was a difference of opinion as to the necessity for the more elaborate improvements decided upon by the commissioners and increasing the cost, and a conflict in the evidence as to whether the attorney employed by them expected to profit in some improper way in the letting of the contract and the sale of bonds. *Columbia River Timber & Logging Co. v. Commissioners of Diking District No. 2*..... 148
3. SAME (13-1) — DISTRICTS — LIABILITIES—CONTRACTS—VALIDITY. It cannot be said that the commissioners abused their discretion in employing an attorney for \$3,000 to do all the legal work in connec-

Drains—Continued.

tion with the construction of an improvement costing \$168,000, including the assessment of benefits and damages in eminent domain proceedings. *Columbia River Timber & Logging Co. v. Commissioners of Diking District No. 2*..... 148

Due Process of Law:

See CONSTITUTIONAL LAW, 4.

Duplicity:

Necessity of objection to information, see CRIMINAL LAW, 6.

Dying Declarations:

See HOMICIDE.

Earnings:

Dividends on corporate stock, see CORPORATIONS, 2, 3.

Ejectment:

Recovery of leased premises, see LANDLORD AND TENANT, 4-7.

Election:

By acceptance of costs, see COSTS, 4.

Between causes of action, counts, or defenses, see PLEADING, 10.

Registration of voters, see STATUTES, 1.

Election of Remedies:

Retaking goods sold as bar to action for purchase price, see SALES, 11.

Embezzlement:

See LARCENY, 2.

Eminent Domain:

1. EMINENT DOMAIN (86-88, 136) — COMPENSATION — DEDUCTION OF BENEFITS—INSTRUCTIONS TO JURY. In condemnation proceedings on behalf of the state for the purpose of a public highway, there may be offset against the damages, as special benefits to lands not taken, the enhancement of the market value after the improvement; and the jury is properly instructed that the measure of damages is the market value of the strips taken, together with the depreciation caused by the taking, from which the jury should deduct such sum as the lands were actually benefited or enhanced in value by the construction of the road; and it was not necessary to define general or common benefits and then tell the jury not to consider them. *State v. Kelley*..... 245
2. EMINENT DOMAIN (120)—PROCEEDINGS—NECESSITY OF ANSWER. In condemnation proceedings for a county road, no answer is necessary, and it is therefore not error to sustain a demurrer to an answer or

Eminent Domain—Continued.

in refusing to allow a second answer. *State ex rel. McPherson Bros. Co. v. Superior Court*..... 58

3. EMINENT DOMAIN (158) — REVIEW ON CERTIORARI — RECORD. On certiorari to review proceedings to condemn a county road, the absence of evidence in the record does not show that no evidence was received, where the clerk's certificate merely stated that the record contains a true copy of the files, and the judgment recited that the order of necessity was made upon testimony received. *State ex rel. McPherson Bros. Co. v. Superior Court*..... 58
4. SAME (158). On certiorari to review an order of necessity for the condemnation of land for a county road, sufficiency of the facts cannot be reviewed where the evidence was not brought up. *State ex rel. McPherson Bros. Co. v. Superior Court*..... 58

Employers' Liability Act:

See MASTER AND SERVANT, 1-3, 7-11.

Entry:

Of public lands, see PUBLIC LANDS, 1.

Equitable Estoppel:

See ESTOPPEL.

Equity:

Costs in equity, see COSTS, 1, 3.

Escrows:

Delivery of deed in escrow, effect, see DEEDS.

Establishment:

Of drains, see DRAINS.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.
Created by will, see WILLS, 1.

Estoppel:

To deny corporate powers, see CORPORATIONS, 7.
By judgment, see JUDGMENT, 2, 3.
To object to assessment, see MUNICIPAL CORPORATIONS, 2.
Of partner to acquire adverse title, see PARTNERSHIP, 1.

1. ESTOPPEL (33)—GROUNDS—INCONSISTENT CLAIM IN PRIOR LITIGATION. Where, on a contested claim, the executor asserted that the claim was satisfied by a deed to the claimant, who was also the devisee, and that title passed by the deed rather than by the will, the executor is estopped, in a subsequent will contest by the devisee, from asserting that title passed by the will rather than the deed

Estoppel—Continued.

- and that the devise was forfeited by the will contest, under the forfeiture clause in the will. *White v. Chelley*..... 526
2. **ESTOPPEL (48, 54)—LANDLORD AND TENANT (40, 129)—WAIVER OF FORFEITURE.** A landlord is estopped to declare a forfeiture of a lease for breach of conditions as to the purposes for which the premises could be used, where he permitted the tenant to occupy the premises in contravention of the terms of a written lease during the entire period of the first term, and his agent gave express consent to continue to do so during the second term and to alterations for that purpose, which the tenant made at considerable trouble and expense. *Andersonian Investment Co. v. Wade*..... 373

Evidence:

See **CRIMINAL LAW**, 3.

Review of rulings as dependent on presentation by record, see **APPEAL AND ERROR**, 8-11.

Effect of error on appeal, see **APPEAL AND ERROR**, 17, 18.

In actions on notes, see **BILLS AND NOTES**, 3.

Evidence to show transaction to be chattel mortgage, see **CHATTEL MORTGAGES**, 1.

Evidence of corporate existence, see **CORPORATIONS**, 1.

Certified copies, see **CRIMINAL LAW**, 2.

Reception at trial in general, see **CRIMINAL LAW**, 5.

Of damages, see **DAMAGES**, 5-7.

Depositions, see **DEPOSITIONS**.

Claims against decedent's estates, see **EXECUTORS AND ADMINISTRATORS**, 4.

For fraud, see **FRAUD**, 1, 2.

To set aside fraudulent conveyance, see **FRAUDULENT CONVEYANCES**.

Burden of proof as to exception from class, see **INTOXICATING LIQUORS**.

Creation and existence of agency for insurer, see **INSURANCE**, 1, 2.

For injuries to servant, see **MASTER AND SERVANT**, 15-17.

Parol evidence to show deed absolute on its face a mortgage, see **MORTGAGES**.

As to negligence in causing obstructions in streets, see **MUNICIPAL CORPORATIONS**, 10.

For negligence in setting fire, see **NEGLIGENCE**, 3.

Verdict or findings contrary to evidence, see **NEW TRIAL**, 1, 2.

Insufficiency, as ground for new trial, see **NEW TRIAL**, 1, 2.

Newly discovered evidence as ground for new trial, see **NEW TRIAL**, 4, 5.

Admissibility of evidence under pleading, see **PLEADING**, 3.

Existence of agency, see **PRINCIPAL AND AGENT**, 1.

Authority of agent, see **PRINCIPAL AND AGENT**, 2-6.

Negligence causing injuries to persons at crossings, see **RAILROADS**, 5-7.

For review of assessment, see **TAXATION**.

Evidence—Continued.

1. EVIDENCE (27)—PRESUMPTIONS—LAWS OF OTHER STATES. In the absence of pleading and proof, it will be presumed that the laws of a sister state are the same as the laws of this state. *Freyman v. Day* 71
2. EVIDENCE (27)—PRESUMPTIONS—LAWS OF OTHER STATES. In the absence of pleading or proof, the law of the contract made in a sister state is presumed to be the same as our own. *Williams v. Great Northern Railway Co.*..... 344
3. EVIDENCE (27)—PRESUMPTION—LAWS OF OTHER STATES. In the absence of proof, it will be presumed that the law of another state as to assumption of risks is the same as the common law of this state. *Tatum v. Marsh Mines Consolidated*..... 367
4. SAME (42)—COMPETENCY—MOTIVE OR INTENT. If the intention of the grantor in delivering a deed is doubtful, evidence of subsequent acts of the grantor is competent as to the intention at the time of delivering it to a third person. *Garring v. Stephens*..... 474
5. EVIDENCE (48)—COMPETENCY—MARKET VALUE—SALES. The price at which mining stock was sold on the exchange on a certain day is competent evidence of its market value at that time. *Hershey v. Hanauer* 498
6. EVIDENCE (53, 94) — RES GESTAE — ADMISSIONS — STATEMENTS OF AGENT—AFTER TRANSACTION. 'In an action for personal injuries sustained upon a defective county sidewalk, a letter from the deputy prosecuting attorney referring to the defective condition, written fifteen months after the accident, is not admissible as an admission by an agent, since it was not part of the *res gestae*. *Bullock v. Yakima Valley Transportation Co.*..... 413
7. EVIDENCE (76)—BEST EVIDENCE—LOSS OF WRITING. After proof that written statements of the weight of loads of garbage were lost and could not be produced, parol evidence with reference to the regularity of the weight of the daily loads, and their weight on a number of occasions, is admissible upon an issue as to the daily amount of garbage furnished. *Nelson v. Davenport*..... 259
8. EVIDENCE (100)—DECLARATIONS—SELF-SERVING — ADMISSIBILITY OF EVIDENCE OF NONDELIVERY OF DEED. Where a deed was made to a minor and delivered to the grantor's attorney and came into the possession of the grantor's administrator, it is admissible to show the statements of the grantor, after she had conveyed the land to another, that the deed was made at the suggestion of her attorney in anticipation of suits, and was to be returned to her when called for, and that she had requested its return; since she then had no self interest to subserve. *Garring v. Stephens*..... 474
9. EVIDENCE (102, 105)—DECLARATIONS AS TO BOUNDARIES—HEARSAY —ORAL STATEMENTS. Upon an issue as to a disputed boundary line,

Evidence—Continued.

- evidence of declarations of a former owner are inadmissible, where such owner was living and could have been produced to testify, his statements having been made only a few days before. *Alverson v. Hooper* 510
10. EVIDENCE (147, 149) — PAROL — TO VARY WRITING — CONTRACT FOR SALE OF CHATTEL. A written agreement for the absolute transfer of a donkey engine, showing that it was not security for a debt, cannot be varied by parol evidence drawing conclusions from the transaction that it was intended as a chattel mortgage. *Hays v. Bashor* 491
11. EVIDENCE (149, 168) — PAROL TO VARY WRITING — WARRANTY IN SALE OF CHATTELS — COMPLETENESS OF WRITING. Upon the sale of a second-hand engine, under a written warranty expressly limited to a guarantee that it was in good working order and as described in the contract, a further warranty could not be proved by oral evidence, in the absence of fraud. *Western Farquhar Machinery Co. v. Pierce* 621
12. EVIDENCE (168-173) — TO VARY WRITING — CONTEMPORANEOUS OR SUBSEQUENT AGREEMENTS. While a parol agreement contemporaneous with the signing of a written lease, may not, standing alone, be shown contradicting the terms of the lease as to the exclusive use to which the property was put, yet parol evidence is admissible to show that subsequently one of the parties acted upon and the other acquiesced in an oral addition to or modification of the written contract. *Andersonian Investment Co. v. Wade* 373
13. EVIDENCE (185) — OPINION EVIDENCE — SPECIAL KNOWLEDGE — VALUES. In a subcontractor's action for an accounting upon a county building contract, the superintendent for the county is a competent witness as to the amount and reasonable value of extras claimed, even though his allowance thereof as superintendent may not have been conclusive under the contract. *Wiffenbach v. Puget Sound Bridge & Dredging Co.* 455

Eviction:

Under Federal relief act, see ARMY AND NAVY.

Examination:

Of witnesses in general, see WITNESSES.

Exceptions, Bill of:

Necessity for purpose of review, see APPEAL AND ERROR, 9-11.

Excessive Claims:

Effect on costs, see COSTS, 3.

Excessive Damages:

See BREACH OF MARRIAGE PROMISE; DAMAGES, 4.

Executors and Administrators:

1. EXECUTORS AND ADMINISTRATORS (8) — RIGHT TO APPOINTMENT AS ADMINISTRATOR—NONRESIDENTS. A finding that a brother was not entitled to administer an estate because he was a nonresident is sustained, where he came to this state on learning of his brother's death, and had resided here but five days when he filed his application. *In re Fellin's Estate*..... 626
2. SAME (15, 27)—PROCEEDINGS FOR LETTERS — REVOCATION — NOTICE. An application to revoke letters of administration and appoint the applicant must be made on notice, although the statute does not clearly so provide. *In re Fellin's Estate*..... 626
3. EXECUTORS AND ADMINISTRATORS (62) — ALLOWANCE TO WIDOW — CONCLUSIVENESS—VACATION. Under the probate code, Laws of 1917, p. 670, § 103, providing that the judgment awarding an allowance for support to a widow shall be conclusive and final, except on appeal and except for fraud, the judgment cannot be attacked by motion to vacate it after time for appeal has expired, where the court had jurisdiction of the parties and subject-matter and there was no claim of fraud. *In re Hamilton's Estate*..... 326
4. EXECUTORS AND ADMINISTRATORS (67) — CLAIMS — SERVICES RENDERED DECEASED. A claim against an estate for nursing the deceased, made by one who received regular pay for board, meets the requirement that the evidence for extra compensation must be of the clearest and most convincing character, where it appears that no part of the sums paid were for nursing, and that the guardian of the deceased had agreed to pay therefor. *In re Masterson's Estate*.. 307
5. EXECUTORS AND ADMINISTRATORS (169)—SETTLEMENT OF ACCOUNT—OPERATION AND EFFECT. The approval of an administrator's final account is not prevented by the pendency of an appeal upon a disputed claim, the amount of which was deposited with the clerk to abide the result of the suit; since by Laws 1917, p. 694, § 180, a final settlement does not prevent subsequent letters in case other property is discovered. *In re Smith's Estate*..... 652

Expert Testimony:

Testimony in civil actions, see EVIDENCE, 13.

Testimony in criminal prosecutions, see CRIMINAL LAW, 3.

Extension:

Of time as consideration for note, see BILLS AND NOTES, 1.

Extra-Hazardous Employment:

See MASTER AND SERVANT, 1-3, 7-11.

Extras:

What are, see **CONTRACTS**.

In highway work, see **HIGHWAYS**, 2-4.

Factory:

See **MASTER AND SERVANT**, 2.

False Representations:

As ground for rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 3.

Federal Question:

Federal questions controlled by decisions of United States courts, see **COURTS**, 2.

Fellow Servants:

See **MASTER AND SERVANT**, 4, 16.

Fire Insurance:

See **INSURANCE**, 8-11.

Fires:

Care required to prevent spread of fire, see **NEGLIGENCE**.

Fiscal Management:

Of state funds, see **STATES**, 1.

Forbearance:

To sue as consideration, see **BILLS AND NOTES**.

Forcible Entry and Detainer:

Action for unlawful detainer of leased premises, see **LANDLORD AND TENANT**, 4-7.

Foreclosure:

Of mortgage, see **CHATTEL MORTGAGES**, 5.

Forfeiture:

Of bail bond, see **BAIL**.

By breach of covenants as to right of way, see **COVENANTS**.

Waiver of, see **ESTOPPEL**, 2.

Clause in devise, see **WILLS**, 2.

Former Adjudication:

See **JUDGMENT**, 2, 3.

Forms of Action:

Change of form by amendment, see **PLEADING**, 7.

Fraud:

As element of larceny, see LARCENY, 2.

Rescission for, see VENDOR AND PURCHASER, 3.

1. FRAUD (22)—EVIDENCE OF DAMAGE—SUFFICIENCY. There was sufficient evidence of damage, through fraud in the sale of stock, in that the stock was of no value, where the company had shortly before pledged all its property for a debt, soon became insolvent, and had no prospect of paying over twenty cents on the dollar. *Harris v. Saunders* 195
2. FRAUD (25)—ACTIONS FOR DAMAGES—QUESTION FOR JURY. There is sufficient evidence that the purchase of stock in a corporation was induced by the fraudulent representations of the defendant, an officer and director of the company, where it was represented that the company was solvent, was doing a profitable business, had paid dividends, and that the stock had been issued for value received, all of which was false, the company being insolvent and its stock of no value. *Harris v. Saunders*..... 195

Frauds, Statute of:

1. FRAUDS, STATUTE OF (4)—DEBT OF ANOTHER—COLLATERAL OR ORIGINAL PROMISE. An oral statement by a general contractor, to induce one employed by a subcontractor to continue on the work, to go ahead and he would see him paid, is a collateral promise to answer for the debt or default of another, and void under the statute of frauds, where the work continued as in the past with the subcontractor in charge. *Stieffert Company v. Wright*..... 616
2. FRAUDS, STATUTE OF (37) — SALE OF GOODS — MEMORANDUM—SUFFICIENCY. A written contract satisfying the statute of frauds is shown by correspondence where the seller of wheat wrote confirming a sale of 10,000 bushels of blue stem wheat at \$2.44 f. o. b. Eureka Flat points, the buyer to send check of \$1,000 as margin, and the buyer, while at first failing to directly acknowledge the contract, wrote about sixty days later that he would take the wheat "bought from you last August if you will give me time," and fixing date for first shipment subject to sight draft. *Jones-Scott Co. v. Ellensburg Milling Co.* 73

Fraudulent Conveyances:

Validity of chattel mortgage as affected by retention of possession of property by mortgagor, see CHATTEL MORTGAGES, 2.

1. FRAUDULENT CONVEYANCES (88)—EVIDENCE—ADMISSIBILITY. In an action to set aside a deed as fraudulent as to creditors, the question as to whether the deed was antecedent to a judgment against the grantor, and therefore subject to the judgment, is not in issue, since the lien of the judgment may be enforced without recourse to such an action. *DuPont de Nemours Powder Co. v. Pederson*... 335

Fraudulent Conveyances—Continued.

2. **FRAUDULENT CONVEYANCES (91) — FRAUD—EVIDENCE—SUFFICIENCY.** Under the presumption that a transaction has been honestly made, and the rule that proof of fraud must be clear and satisfactory, quitclaim deeds by a debtor, pending a suit, will not be held fraudulent as to creditors, where one of them was intended as a mortgage to secure a *bona fide* debt, and the other was to pay an antecedent debt and upon sufficient consideration. *DuPont de Nemours Powder Co. v. Pederson* 335

Funds:

- Current expense fund, see **MUNICIPAL CORPORATIONS**, 12.
Collection and custody of state funds, see **STATES**, 1.

Garnishment:

- Right to supersede on appeal, see **APPEAL AND ERROR**, 7.
1. **GARNISHMENT (1) — NATURE — TERMINATION.** A garnishment is merely an ancillary proceeding which immediately dies on termination of the original action. *State ex rel. Pioneer Mining & Ditch Co. v. Superior Court* 183

Grazing Lands:

- See **PUBLIC LANDS**, 4.

Guaranty:

- See **INDEMNITY**.

Guardian and Ward:

- Right of guardian to appeal from order of discharge, see **APPEAL AND ERROR**, 2.
1. **GUARDIAN AND WARD — AUTHORITY — INVESTMENTS—LIABILITY.** A guardian for an insane person is liable for money lost through the failure of a bank where, by a specific order, he was directed to invest the money upon real estate security to be approved by the court, and without such approval he invested it in certificates of deposit of such bank, where it remained until the bank failed; and it was immaterial that the trial judge was orally informed of such investment. *In re Jiskra's Estate* 187
2. **GUARDIAN AND WARD—INVESTMENTS—LIABILITY.** Where a guardian for an insane person was ordered to invest moneys collected for the current year in certificates of deposit of a certain bank, which was a bank of good repute, and the next year was ordered to invest collections in certificates of deposit without specifying the bank, he was justified in considering the order as a continuing one and in investing the funds in the same bank, and is not liable for the loss of the funds through failure of the bank. *In re Jiskra's Estate* 190

Guardian and Ward—Continued.

3. SAME (30)—ACCOUNTING—COMPENSATION. Upon allowing the final account of a guardian, an allowance of \$25 attorney's fees and \$25 as a fee for the guardian was proper, under Rem. Code, § 1652. *In re Jiskra's Estate*..... 190

Habeas Corpus:

Custody of children pending appeal, see APPEAL AND ERROR, 6.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 14-19.

Hearsay Evidence:

In civil actions, see EVIDENCE, 8, 9.

Highways:

Criminal offenses as to use, see CRIMINAL LAW, 1.

Appropriation of land for highways, see EMINENT DOMAIN.

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 10, 11.

Duty of railroad as to crossing sidewalks, see RAILROADS, 2, 3.

Accidents at railroad crossings, see RAILROADS, 5-7.

1. HIGHWAYS (13) — ESTABLISHMENT—PETITION—SUFFICIENCY. Rem. Code, § 5623-4, providing for a petition for a county road by ten or more householders does not require that the petition state that they are householders, and where it was signed by ten or more residents and taxpayers and evidence was taken and acted upon, it will be presumed that the county commissioners were satisfied that they were householders. *State ex rel. McPherson Bros. Co. v. Superior Court* 58
2. HIGHWAYS (33) — CONTRACT—CHANGE—EXTRA WORK—EVIDENCE—SUFFICIENCY. Only upon the clearest and most satisfactory evidence, if at all, could there be any estoppel on the part of a county to invoke the clause of a contract for road work which provided, pursuant to Rem. Code, § 5879-9, that no payment shall be made for extra work unless authorized by the county commissioners and approved by the state highway commissioner. *Quigg Construction Co. v. Chelan County*..... 314
3. SAME (33)—EXTRA WORK—QUANTUM MERUIT. An action on *quantum meruit* for extras cannot be maintained where a county road contract had at no time been rescinded or modified and it specifically covered the manner in which extras could be allowed. *Quigg Construction Co. v. Chelan County*..... 314
4. SAME (33). Compensation for extra yardage removed at places where the alignment was changed cannot be recovered on proof of the difference between the preliminary estimates and the total yardage removed including "overbreakage," where, under the contract,

Highways—Continued.

no allowance was to be made for overbreakage and there was no evidence to show the extra amount removed at the places where the road was changed. *Quigg Construction Co. v. Chelan County*... 314

5. HIGHWAYS (61, 66)—DEFECTS—DUTY OF COUNTY—SIDEWALKS. Under Rem. Code, § 951, making a county liable for injuries from acts or omissions of the county, and §§ 3890 and 5575 authorizing county commissioners to lay out highways and giving them control, a county is liable for negligence in failing to maintain county sidewalks in proper repair. *Bullock v. Yakima Valley Transportation Co.* 413
6. HIGHWAYS (64) — DEFECTS—NOTICE TO COUNTY — PHOTOGRAPHS — ADMISSIBILITY. Photographs showing a dilapidated condition of a county sidewalk generally, are admissible against the county only for the purpose of showing notice of the particular defect which caused the injury; and when offered by a codefendant to show plaintiff's contributory negligence, it is error to fail to limit their effect as against the county. *Bullock v. Yakima Valley Transportation Co.* 413

Homestead:

Rights in public lands under homestead laws, see PUBLIC LANDS, 1.

Homicide:

1. HOMICIDE (69) — EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY. In a prosecution for homicide by performing an abortion, a dying declaration of the deceased on the evening of her death is admissible where it states that she consulted and was treated by the defendant, for that purpose, that defendant used a catheter and made deceased feel pretty sick, and knew what she was doing. *State v. Swartz* 21
2. SAME (69). Where such declaration contains statements relating to the acts of another in no way connected with the *res gestae*, they should be stricken. *State v. Swartz*..... 21
3. SAME (69). The statement that deceased heard defendant tell another over the phone what she had done is admissible not as part of the *res gestae*, but as an admission of the accused. *State v. Swartz* 21
4. SAME (70). A dying declaration made nine days subsequent to entering a hospital and in a sense recitals of a past event is admissible, when it but describes links in the chain of criminal conduct that was not complete until death was accomplished by the illegal operation. *State v. Swartz*..... 21
5. HOMICIDE (89)—TRIAL—RECEPTION OF EVIDENCE—DYING DECLARATIONS. In a prosecution for homicide, the accused is entitled to dis-

Homicide—Continued.

play to the jury the proven signature of the deceased to a dying declaration, where it was on a sheet separate and apart from the declaration itself and could not confuse the jury. *State v. Swartz* 21

Householder:

Presumption as to signers of petition, see HIGHWAYS, 1.

Husband and Wife:

1. HUSBAND AND WIFE (29, 74)—SEPARATE DEBTS—CONTRACTS WITH HUSBAND JOINTLY. A note by a husband and wife for an obligation which, before their marriage, was the separate debt of the husband upon which his future wife was an accommodation party, is the separate debt of each and not their community debt; nor was its character changed by the new promise. *Katz v. Judd*..... 557
2. HUSBAND AND WIFE (87) — COMMUNITY PROPERTY — PERSONAL INJURIES TO WIFE—ACTIONS—PARTIES. A wife, living with her husband, cannot, in the absence of any reason for not joining him, maintain an action alone for personal injuries, since the same is community property in the sole management and control of the husband, under Rem. Code, § 5917. *Hynes v. Colman Dock Co.*..... 642
3. SAME (94) — COMMUNITY PROPERTY — JUDGMENT. In an action against husband and wife upon their joint note, which was not a community debt, the judgment should be joint and several against the defendants, but not against the community. *Katz v. Judd*.. 557

Hypothetical Questions:

In examination of expert witnesses, see CRIMINAL LAW, 3.

Improvements:

As element of compensation for appropriation of land, see EMINENT DOMAIN, 1.

Liens, see MECHANICS' LIENS.

Public improvements, see MUNICIPAL CORPORATIONS, 2-4.

Incompetency:

Of evidence, see EVIDENCE, 4, 5.

Incumbrances:

See CHATTEL MORTGAGES; MECHANICS' LIENS.

Indebtedness:

Of fraudulent grantors, see FRAUDULENT CONVEYANCES, 2.

Indemnity:

Against mechanics' liens, see MECHANICS' LIENS.

Indemnity lands, see PUBLIC LANDS, 3.

Indemnity—Continued.

1. INDEMNITY (4, 5)—SCOPE AND EXTENT OF LIABILITY—LIMIT AS TO TIME. An indemnity bond to protect a surety on a county depository bond given by a bank is not limited to one year, where the depository's term and bond were not limited to any definite term, and the indemnity bond agreed to save and hold the surety harmless from any and all liability in consequence of having executed the depository bond. *National Surety Co. v. Campbell*..... 596
2. INDEMNITY (7) — PRINCIPAL AND SURETY (52) — BUILDING CONTRACTS—BOND—LIMITATIONS. A limitation in a contractor's bond requiring suit to be commenced within six months after the time fixed for the completion of the work is not controlling where there was a valid excuse for delay; and the surety company is foreclosed from raising the point where it induced delay until lien claims could be adjudicated in pending litigation. *Columbia Security Co. v. Aetna Accident & Liability Co.*..... 116
3. INDEMNITY (10-1)—PRINCIPAL AND SURETY (47)—DEFENSES. It is no defense to an action upon a contractor's bond that the principal was not made a party, as required by the bond, where an order was made and complied with making him a party and an unsuccessful effort made to serve him, and no further insistence on the point was made, although the surety produced him as a witness. *Columbia Security Co. v. Aetna Accident & Liability Co.*..... 116
4. SAME. A change in the plans and specifications increasing the cost more than twenty per cent, in violation of the terms of the contractor's bond, is not a defense to the action, where the extra liability was incurred through the unauthorized act of the architect without the owner's knowledge, and beyond the powers conferred in the contract. *Columbia Security Co. v. Aetna Accident & Liability Co.*..... 116
5. SAME. Such a change in the plans and specifications will not defeat an action on the bond where the same was known and explained to surety's agent, when application for the bond was made, the plans and specifications being already abandoned before the bond was signed. *Columbia Security Co. v. Aetna Accident & Liability Co.*..... 116

Indictment and Information:

See LARCENY, 2-4.

Indorsement of witnesses on information, see CRIMINAL LAW, 4.

Duplicity, necessity of objection, see CRIMINAL LAW, 6.

Mandamus to compel filing, see MANDAMUS, 2.

Indorsement:

Of names of witnesses on information, see CRIMINAL LAW, 4.

Industrial Insurance:

See CONSTITUTIONAL LAW, 3; MASTER AND SERVANT, 1-3, 7-11.
Title of act, see STATUTES, 2.

Infants:

See GUARDIAN AND WARD.
Adoption of, see ADOPTION.

1. INFANTS (4)—CUSTODY OF DEPENDENTS—POWERS OF COURT—MODIFICATION OF ORDER—PROCEEDINGS—DISCRETION. The juvenile court law, Rem. Code, § 1987-1 *et seq.*, having given the court power to modify or set aside an order for the custody of a child without providing the manner of its exercise or defining the person entitled to institute the proceedings, it is discretionary for the court to inquire into the interest of a party seeking the relief before directing process, which does not issue as a matter of right. *State ex rel. Mead v. Superior Court*. 636

Inheritance:

By adopted child, see ADOPTION.

Initiative and Referendum:

See STATUTES, 1.

Injunction:

By licensee against landlord, see LANDLORD AND TENANT, 3.

1. INJUNCTION (49) — PLEADING—INTERFERENCE WITH WAY. A complaint for an injunction is sufficient where, although somewhat meager, it alleges that the defendant wrongfully refuses to allow the plaintiff to enter defendant's apartment house for the purpose of making delivery of goods sold to tenants in the building. *Konick v. Champneys*. 35

Insane Persons:

Liabilities of guardian, see GUARDIAN AND WARD.

Instructions:

See LARCENY, 4, 5.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 14, 19.
Waiver of request for, see STIPULATIONS, 2.
In civil actions, see TRIAL, 5-8.

Insurance:

1. INSURANCE (196) — MUTUAL BENEFIT ASSOCIATION — BY-LAWS — PRESUMPTIONS. The by-laws of a mutual benefit association are binding on all its members, who are conclusively presumed to know them, although adopted subsequent to the contract. *Miller v. Supreme Tent etc. Maccabees*. 689

Insurance—Continued.

2. **SAME** (196). A member of a mutual benefit association who fails to report and pay extra premiums for a more hazardous employment engaged in, thereby changes the amount of his life benefit, where the by-law provides for an increased rate and that, unless the change is reported and extra rate paid, the benefit paid for accidental death shall be \$300 on the basis of a \$1,000 certificate. *Miller v. Supreme Tent etc. Maccabees*..... 689

Intent:

- As affecting delivery of deed, see **DEEDS**.
- Competency of, see **EVIDENCE**, 4.

Interest:

- Failure to include in judgment, necessity of objection, see **APPEAL AND ERROR**, 3.
- Rate for city bonds, see **MUNICIPAL CORPORATIONS**, 13-16.

Interstate Commerce:

- See **COMMERCE**.
- Decisions of United States courts as authority in state courts, see **COURTS**, 2.
- Title of act, see **STATUTES**, 2.

Intoxicating Liquors:

- Subject of larceny, see **LARCENY**, 1.
- 1. **INTOXICATING LIQUORS** (48)—**DEFENSES—EXCEPTED CLASS—BURDEN OF SHOWING STATUS**. Under Laws 1917, p. 60, § 17h, making it unlawful for any person, except a regularly ordained clergyman, priest or rabbi, to have possession of intoxicating liquor, the burden of showing that the accused was a clergyman or rabbi is upon the defendant as a matter of defense. *State v. Harding*..... 606

Investments:

- Liability for losses, see **GUARDIAN AND WARD**.

Joinder:

- Of causes of action, see **ACTION**, 1.

Joint Adventures:

1. **JOINT ADVENTURES—PARTNERSHIP** (1,2)—**COMMUNITY OF INTEREST—SHARING PROFITS AS RENT**. A partnership or joint adventure is not constituted by an agreement called a farm lease, with the usual provisions as to subletting, reentry, control and farming, which gave the lessor one-third of the crop for rent and one-third for use of equipment and its upkeep to be furnished by the lessor, the lessee to pay the cost of operation, and the balance of the crops, with increase of the stock, to be divided equally, where it contained no

Joint Adventurers—Continued.

agreement that the lessor should share in the losses; but the same will be construed to be a lease creating the simple relation of landlord and tenant only. *State ex rel. Ratliffe v. Superior Court*... 443

Joint Tort Feasors:

Liability for costs, see COSTS, 4.

Release of, see JUDGMENT, 4.

Judges:

Change of venue for prejudice of judge, see VENUE.

Judgment:

Review in general, see APPEAL AND ERROR.

Right to review of order opening or vacating judgment, see APPEAL AND ERROR, 1.

Power of lower court after perfection of appeal, see APPEAL AND ERROR, 6.

Judgment on appeal or error, see APPEAL AND ERROR, 20.

Decision of courts in general, see COURTS, 2.

Modification of decree respecting custody of children, see DIVORCE, 1.

On judgment note of woman jointly with husband, see HUSBAND AND WIFE, 3.

Against tenant for unlawful detainer, see LANDLORD AND TENANT, 7.

On liens, deduction from contractor, see MECHANICS' LIENS, 2.

On pleadings, see PLEADING, 2.

1. JUDGMENT (34)—DEFAULT—PROOF. The taking of proof *ex parte* after default does not make the judgment other than one by default. *Van Buren v. Peterson*..... 697
2. JUDGMENT (222)—CONCLUSIVENESS—BAR—MATTERS ACTUALLY LITIGATED. A judgment on a contested claim against an estate that the claim had been satisfied by a deed of property also devised to claimant, is *res judicata* in a subsequent will contest, and conclusive that the deed was delivered and that the title passed to the devisee at the time of the delivery of the deed, rather than by the will at the date of testator's death. *White v. Chellev*..... 526
3. JUDGMENT (222, 231) — CONCLUSIVENESS—MATTERS LITIGATED—INFERENCES AS TO INTEREST. A decision on a former appeal, directing judgment upon a claim against an estate in a specified sum, followed by the denial of a petition to direct the remittitur to specify the date from which interest should run, is a direct adjudication and *res adjudicata* to the effect that interest is to run from the date of the judgment only. *Olsen v. Hagan*..... 531
4. JUDGMENT (270)—RELEASE (6)—JOINT TORT FEASORS. The release and satisfaction of a judgment against one joint tort feasor operates as a release of a judgment recovered in another action against the other joint tort feasor for the same wrong, in a larger sum, as to

Judgment—Continued.

both principal and interest; and it is immaterial that there was an understanding between the parties that the payment of the one judgment was to operate only as a *pro tanto* satisfaction of the other. *Larson v. Anderson*..... 157

Judicial Acts:

Mandamus to compel, see MANDAMUS.

Jurisdiction:

Effect of appearance, see APPEARANCE.

Jury:

Taking case or question from jury at trial, see TRIAL, 2, 3.
Instructions in civil actions, see TRIAL, 5-8.

Juvenile Courts:

Powers over delinquent child, see INFANTS.

Kin:

Right to letters of administration, see EXECUTORS AND ADMINISTRATORS, 1.

Knowledge:

Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 5, 6.

Laches:

Application for new trial, see NEW TRIAL, 3.

Landlord and Tenant:

Eviction under Federal relief act, see ARMY AND NAVY.

Waiver of forfeiture, see ESTOPPEL.

Parol evidence to vary lease, see EVIDENCE, 12.

1. LANDLORD AND TENANT (12-1)—LEASE—MODIFICATION — QUESTION FOR JURY. In a landlord's action for damages for the tenant's failure to summer-fallow half of the land each year, whether the lease was modified by an agreement was for the jury, where the defendant testified that the cropping of the east half two years in succession was with plaintiffs' consent and approval. *Bono v. Warner*..... 180
2. LANDLORD AND TENANT (17)—TRANSFER OF REVERSION—RIGHTS AND LIABILITIES OF GRANTEES AND TENANTS — CONSTRUCTION OF LEASE. Under a farm lease of two farms, whereby, for a share of the crops and increase in the stock, the tenants were to operate the farms with equipment furnished by the landlord, upon a sale of the upper farm subject to the lease, the vendee thereof and the tenants could cancel the lease as to such farm and surrender possession to such vendee; and subsequent purchasers of the other farm and all the

Landlord and Tenant—Continued.

- equipment, subject to the lease, had no right to oust the other vendee in virtue of any right they might have to compel the tenants to perform the contract by using the equipment on the farm first sold; their remedy, if any, being against the tenants for breach of contract. *State ex rel. Ratcliffe v. Superior Court*..... 443
3. LANDLORD AND TENANT—INJUNCTION—RIGHTS OF THIRD PERSONS—
INVITEE. A grocer delivering goods to tenants in an apartment house is an invitee as distinguished from a licensee, and has the right to use the entrance-ways to the building, and can enjoin the landlord from interfering with such right of entry. *Konick v. Champneys*. 35
4. SAME (126) — UNLAWFUL DETAINER—STATUTORY PROVISIONS—EX-
ISTENCE OF RELATION. The conventional relation of landlord and tenant to sustain an action of unlawful detainer may be created by implication, and arises where defendant entered without the knowledge of plaintiff, who immediately gave notice to quit or pay rent; especially in view of Rem. Code, § 8805, providing that a person obtaining possession without the owner's consent shall be deemed a tenant by sufferance and liable for reasonable rent. *Williamson v. Hallett*..... 176
5. LANDLORD AND TENANT (129)—UNLAWFUL DETAINER — DEFENSES—
EQUITABLE ESTOPPEL. In unlawful detainer of leased premises in lawful possession, upon an attempted forfeiture of the lease for breach of conditions, the tenant may present a defense, legal or equitable, excusing the breach, and may show equitable estoppel to enforce the conditions. *Andersonian Investment Co. v. Wade*.. 373
6. LANDLORD AND TENANT (141)—UNLAWFUL DETAINER—COMPLAINT—
ALLEGATION AS TO EXISTENCE OF RELATION. In an action of unlawful detainer, a complaint is not demurrable in failing to allege how and under what terms the defendant took possession, in the absence of any motion to make more definite and certain. *Williamson v. Hallett* 176
7. LANDLORD AND TENANT (147)—UNLAWFUL DETAINER—DOUBLE DAM-
AGES. In an action of unlawful detainer of leased premises, judgment upon verdict for the plaintiff should be for double damages, regardless of whether or not the verdict was founded upon nonpay-
ment of rent. *Swanson v. Stubb*..... 170

Lands:

See PUBLIC LANDS.

Larceny:

1. LARCENY (2)—PROPERTY SUBJECT—OUTLAWED WHISKEY. Whiskey, although outlawed and unlawfully held by one whose possession the law did not protect, may be the subject of larceny. *State v. Donovan* 276

Larceny—Continued.

2. SAME (3, 10) — FRAUD OR APPROPRIATION — INFORMATION — SUFFICIENCY. An information for the larceny of whiskey charging that defendant obtained it by the "trick and device" of appearing as a police officer, and so having obtained it, did feloniously take and appropriate it to his own use, sufficiently charges the act of taking and appropriation as one continuous transaction, and is therefore not confined to larceny by embezzlement by a public officer as defined in Rem. Code, § 2601, subd. 3. *State v. Donovan*..... 276
3. SAME (6)—INFORMATION—SUFFICIENCY. An information for the larceny of whiskey which alleged that it was taken by the "trick and device" of defendant's appearing as a police officer, does not show on its face that it was taken into the custody of the law. *State v. Donovan*..... 276
4. SAME (34)—TRIAL—INSTRUCTION. In a prosecution for larceny, an instruction as to the value necessary to constitute grand larceny, is not prejudicial in failing to state all the elements of the offense, where such elements were stated in other instructions. *State v. Donovan* 276
5. SAME (34)—TRIAL—INSTRUCTIONS. Under such an information, instructions submitting the question of guilt in the original taking, and in appropriating it to his own use following the original taking, are proper, since these two theories of guilt are not inconsistent. *State v. Donovan*..... 276

Law of the Road:

Instructions as to collision with automobile, see MUNICIPAL CORPORATIONS, 6.

Laws:

Of other state, necessity of proof, see MASTER AND SERVANT, 8.

Leases:

See LANDLORD AND TENANT.

Of state mineral lands, see MINES AND MINERALS.

Of grazing lands, see PUBLIC LANDS, 4.

Legal Voters:

See STATUTES, 1.

Legislation:

Appropriations, operation and effect, see STATES, 2.

Licenses:

Regulation of interstate commerce, see COMMERCE.

Liens:

Jurisdiction over lien on ship, see **APPEARANCE**.

Venue of action to enforce lien against ship, see **COURTS**, 1.

Lieu Lands:

See **PUBLIC LANDS**, 3.

Life Insurance:

See **INSURANCE**.

Limitation:

Of action on indemnity bond, see **INDEMNITY**, 1, 2.

Of indebtedness and expenditures of municipality, see **MUNICIPAL CORPORATIONS**, 12.

Limitation of Actions:

Claims against county, see **COUNTIES**, 3-6.

Action on claim against county for personal injuries, see **COUNTIES**, 4-6.

1. **LIMITATION OF ACTIONS (17-1)—IMPLIED CONTRACTS—COUNTIES—OFFICERS—RECOVERY OF COMPENSATION FOR SERVICES.** Upon the rendition of services by a county commissioner for which the law fixed an unchanged compensation during the whole period, there arises an implied obligation of a contractual nature to pay such compensation, governed by the three-year statute of limitations, Rem. Code, § 159, for actions on contracts, express or implied. *State ex rel. McMillan v. Miller*..... 390
2. **SAME (36) — ACCRUAL—MUNICIPAL OBLIGATIONS—SALARY OF OFFICERS.** Under Rem. Code, § 4075, providing that the salary of county officers shall be paid and warrants therefor drawn monthly on the first Monday of each month, a right of action therefor accrues each month, notwithstanding the salary is fixed by Id., § 4037, at \$1,800 "per annum." *State ex rel. McMillan v. Miller*..... 390

Liquors:

See **INTOXICATING LIQUORS**.

Lis Pendens:

Pendency of other action ground for abatement, see **ABATEMENT AND REVIVAL**, 1.

Logs and Logging:

1. **LOGS AND LOGGING (1)—SALE OF STANDING TIMBER—TIME FOR REMOVAL.** A sale of standing timber, with the right to enter from date of the deed until the timber may be cut and removed, requires its removal within a reasonable time; and where it was reasonably convenient to log the land at the date of sale, there was a ready

Logs and Logging—Continued.

market for logs, and the land was chiefly valuable for agricultural purposes, a finding that twelve years was not a reasonable time is unwarranted. *Morgan v. Veness Lumber Company*..... 674

Lost Instruments:

Secondary evidence of contents, see EVIDENCE, 7.

Maintenance:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 3.

Mandamus:

1. **MANDAMUS (19)—JUDICIAL PROCEEDINGS—EXERCISE OF DISCRETION.** Mandamus does not lie to compel the superior court to enter judgment upon a remittitur where the supreme court did not direct a specific judgment, but the direction given was only such as the law gives, and the superior court was not refusing to exercise its discretion or proceed to a final determination of the case; since mandamus does not lie to control discretion or review error. *State ex rel Luketa v. Jurey*..... 44
2. **MANDAMUS (29) — CRIMINAL PROSECUTIONS — COMPELLING FILING INFORMATION.** Mandamus does not lie to compel the filing of an information and trial of accused, held by a committing justice, although accused had waived examination, where the justice retained the cause for examination; since the right of the superior court to control the action arises only after the justice's return. *State ex rel. Cline v. Superior Court*..... 603
3. **MANDAMUS (52) — WHEN LIES — ISSUANCE OF WARRANTS.** Mandamus lies to compel the issuance of a warrant by the county auditor to pay a claim arbitrarily rejected by the county commissioners; since mandamus is but one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. *State ex rel. Clapp v. Urquhart*..... 299
4. **SAME (57) — PAYMENT OF WARRANTS.** In mandamus to compel the issuance and payment of a warrant on a claim arbitrarily rejected by the county commissioners, the county treasurer, joined with the auditor and commissioners, should be dismissed, where it does not appear that he would refuse to pay the warrant, nor that he had funds on hand with which to do so. *State ex rel. Clapp v. Urquhart* 299

Marine Insurance:

See INSURANCE, 1-4.

Maritime Work:

Industrial insurance, see MASTER AND SERVANT, 1.

Market Value:

Competency of, see EVIDENCE, 5.

Marriage:

See BREACH OF MARRIAGE PROMISE.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

1. MASTER AND SERVANT (20-1) — INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT—MARITIME WORK OF STEVEDORE. The amendment to the Federal Judiciary act of October 17, 1917 (U. S. Comp. St., §§ 991, 1233) saving to claimants in all civil causes of admiralty and maritime jurisdiction in the Federal courts the rights and remedies under the workmen's compensation law of any state, did not have the effect of establishing the jurisdiction of the state workmen's compensation act over personal injuries to workmen occurring on board ships, since the state act does not afford a remedy to such workmen or entitle the commission to collect premiums from employers therefor. *Lund v. Griffiths & Sprague Stevedoring Co.*... 220
2. MASTER AND SERVANT (20-1) — WORKMEN'S COMPENSATION ACT — "WORKSHOP"—STATUTES. A gas company's general office for clerical work in which a clerk operated a power-driven machine to make zinc plates or stencils for printing gas bills is a "factory" or workshop, within the meaning of the workmen's compensation act, Rem. Code, §§ 6604-3, 6604-4, precluding actions for personal injuries by employees. *Gowey v. Seattle Lighting Co.*..... 479
3. SAME (20-1) — EXTRA HAZARDOUS EMPLOYMENT—OPERATING STENCIL IMPRINTOR. The operation of a power-driven machine to make zinc plates or stencils for printing gas bills, by a woman clerk employed in the general office at clerical work for the larger part of the time, is "extra hazardous," within the workmen's compensation act, Rem. Code, §§ 6604-3, 6604-4, precluding actions for personal injuries by employees; and it is immaterial that, when the machine was in perfect order, injury was practically impossible. *Gowey v. Seattle Lighting Co.*..... 479
4. MASTER AND SERVANT (74)—FELLOW SERVANTS—METHODS OF WORK —STATUTORY LIABILITY. An agreement between one employed as a blacksmith and his helper as to the method of performing their work does not fall within the provisions of Laws of Idaho, 1909, p. 34, § 1, making the master liable for injuries to servants by any act of fellow servants done in obedience to the rules and regulations or by-laws of the master. *Tatum v. Marsh Mines Consolidated.* 367
5. MASTER AND SERVANT (98, 99)—ASSUMPTION OF RISKS—KNOWLEDGE BY SERVANT OF DEFECT OR DANGER. An experienced window washer

Master and Servant—Continued.

- assumed the risk or was guilty of contributory negligence, when, owing to defective window stops, a window he had frequently washed and to which he was holding, pulled through and he was killed; the master having no notice of the defect. *Brandon v. Globe Investment Co.* 360
6. MASTER AND SERVANT (100, 101) — ASSUMPTION OF RISKS — COMPLAINTS—PROMISE TO REMOVE DANGER. A blacksmith's assumption of risk from the incompetence of his helper is not avoided by the fact that he made two complaints to the foreman and requested a change of helpers, where he did not indicate unwillingness to remain in the service, and the foreman merely stated he would see what could be done about it. *Tatum v. Marsh Mines Consolidated*..... 367
7. MASTER AND SERVANT (121-2) — WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY — AWARD FOR FURTHER ACCIDENT — STATUTES—CONSTRUCTION. Under Rem. Code, § 6604-5, subdvs. b., f. and g., defining permanent total disability and permanent partial disability, and providing that, should a further accident occur to a workman previously the recipient of a lump sum payment, his further compensation shall be adjusted with regard to the combined effect of his injuries, a workman suffering at different times two permanent partial disabilities, not classified as a permanent total disability, cannot recover compensation in excess of the \$1,500 maximum for partial disability; and his second award must be made in view of his past receipt of money under the act. *Biglan v. Industrial Insurance Commission*..... 8
8. MASTER AND SERVANT (121-2) — WORKMEN'S COMPENSATION ACT — REMEDIES. An action cannot be maintained by an employee for injuries sustained in another state while working in an extra hazardous employment (mining) in the absence of allegation or proof as to the laws of such state, which presumptively are the same as our own, withdrawing relief for such injuries from private controversy. *Freyman v. Day*..... 71
9. MASTER AND SERVANT (121-2) — INJURIES TO SERVANT—REMEDIES UNDER WORKMEN'S COMPENSATION ACT—RETROACTIVE EFFECT. Laws of 1917, p. 76, amending the workmen's compensation act and providing that, if the injury renders the workman so helpless as to require the services of a constant attendant, the monthly payment shall be increased twenty dollars, applies from the date of the passage of the act to injuries that occurred previously; and to so apply it does not give the act a retroactive effect contrary to the intention of the legislature. *Talbot v. Industrial Insurance Commission*..... 231
10. MASTER AND SERVANT (121-2) — INJURIES TO SERVANT — REMEDIES UNDER WORKMEN'S COMPENSATION ACT — PARTIAL DISABILITY — RECOVERY FOR DIFFERENCE IN EARNING POWER—STATUTES—CONSTRUCTION.

Master and Servant—Continued.

In view of Rem. Code, § 6604-5 (d), providing that, in case of recovery and partial restoration of earning power by an injured workman, payments shall continue in the proportion which the new earning power shall bear to the old, a remittitur on appeal and judgment therein, under a decision quoting the statute and directing the insurance department to make such an order for compensation as will reasonably cover the difference in the wage-earning power, means no more than that the award shall be in the proportion which the new earning power shall bear to the old. *Parker v. Industrial Insurance Department*..... 235

11. SAME (121-2)—WORKMEN'S COMPENSATION ACT—REMEDIES—STATUTES—AMENDMENT. Laws 1917, p. 487, amending Rem. Code, § 6604-8, relating to employers who are in default in contributing to the accident fund, does not preserve to the injured workman a right of action against such an employer. *Gowey v. Seattle Lighting Co.* 479
12. SAME (124)—INJURIES TO SERVANT — PLEADING—COMPLAINT—NEG-
LIGENCE ON PART OF MASTER—PLEADING NOTICE OF DEFECT IN MACHINE. In an action for personal injuries to a stevedore resulting from structural defects in the winches, making them unsuitable for the work, the master's knowledge need not be alleged in the complaint or directly proved, but may be inferred where they were discoverable either by inspection or by putting them into actual service. *Lund v. Griffiths & Sprague Stevedoring Co.*..... 220
13. MASTER AND SERVANT (129) — INJURY TO EMPLOYEE — ACTIONS —
PLEADING—ISSUES, PROOF AND VARIANCE. The state law and the Federal employers' liability act having established the same rules in actions against carriers engaged in both interstate and intrastate commerce, it is not a fatal variance, warranting a dismissal of the action, that the complaint, broad enough to cover both laws, pleads a cause of action under the Federal act (U. S. Comp. St., 1916, §§ 8657-8665), while the proof failed to bring plaintiff within the provisions of that act but did establish that he was an employee entitled to protection by the state law, Laws 1917, p. 96, § 19. *Archibald v. Northern Pac. R. Co.*..... 97
14. SAME (129)—PLEADING—VARIANCE—DEFECTS IN MACHINE—EFFECT
OF VARIANCE. It is not a fatal variance that the complaint alleged that winches were defective in having insufficient play in the eccentrics, making them difficult of control, and the proof showed that the throttle valves were intended to be described and were responsible for the difficulty of control; since under Rem. Code, § 299, a variance is immaterial unless it actually misled the party to his prejudice, and there was a failure to prove the allegation "in its entire scope and meaning." *Lund v. Griffiths & Sprague Stevedoring Co.* 220

Master and Servant—Continued.

15. SAME (155) — EVIDENCE—QUESTION FOR JURY AS TO MASTER'S NEGLIGENCE—TOOLS AND APPLIANCES—UNSAFETY OF WINCHES ON VESSEL. Whether winches were unsafe is a question for the jury where, although the evidence was conflicting, there was testimony that they were "touchy" and unsafe in the hands of any driver. *Lund v. Griffiths & Sprague Stevedoring Co.*..... 220
16. SAME (161)—ASSUMPTION OF RISKS—FELLOW SERVANTS—QUESTION FOR JURY. Plaintiff, a machinist's helper, instructed to protect his eyes from flying pieces of steel, does not, as a matter of law, assume the risk of negligence of the machinist in continuing the dangerous work while plaintiff, pursuant to instructions, was changing his position and had not reached a place of safety. *Archibald v. Northern Pac. R. Co.*..... 97
17. SAME (184)—ACTIONS FOR INJURIES TO THIRD PERSONS—VERDICT IN FAVOR OF THIRD PERSON—RELEASE OF MASTER. In a stevedore's action against the owner of a ship and the stevedoring company employing him, for injuries sustained through the use of defective winches on the ship, a verdict exonerating the ship owner does not exonerate the plaintiff's employer, where the latter undertook to load the boat employing its own means, even if the verdict was inconsistent and subject to some other form of relief. *Lund v. Griffiths & Sprague Stevedoring Co.* 220

Material Facts:

Certificate to statement of facts, see APPEAL AND ERROR, 11.

Measure of Damages:

See DAMAGES.

Mechanics' Liens:

1. MECHANICS' LIENS — SATISFACTION OF CLAIMS OF OWNER—ESTABLISHMENT OF LIEN—NECESSITY FOR ADJUDICATION. Where the building contract provides that the owner may retain an amount sufficient to indemnify him against any lien or claim for which the owner of the premises might be chargeable, it is not necessary that the lien claims be actually adjudicated, but a compromise and payment of claims pending in litigation entitles the owner to deduct the amounts paid on claims which were shown, by stipulation, to be valid liens against the building for material and labor furnished to the contractor. *Simpson v. Sisters of Charity of the House of Providence.* 82
2. SAME. Rem. Code, § 1139, providing that, in case of judgment upon a lien, the owner shall be entitled to deduct the amount from the sum due the contractor, is not a limitation upon the right of the owner to protect his property, and does not require judgment upon a lien to entitle the owner to indemnity. *Simpson v. Sisters of Charity of the House of Providence.*..... 82

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF, 2.

Mines and Minerals:

1. MINES AND MINERALS (1-A)—LEASE OF MINERAL LANDS—RESERVATIONS. The lessee of state mineral lands is entitled to a lease with all the rights granted by Rem. Code, §§ 6782-6787, as amended by Laws 1917, p. 599; hence the commissioner of public lands is without discretion to reserve to the state the timber and other materials except those granted by the lease. *State ex rel. Morris v. Savidge*. 671
2. MINES AND MINERALS (17, 19-1) — CONTRACTS—SALE AND DEVELOPMENT. Upon an issue as to the terms of a contract for the development and sale of mining claims, which defendants claim left plaintiff indebted to them, held that conflicting evidence preponderates in favor of the plaintiff, in view of the fact of defendants' borrowing money from and making a payment to plaintiff at the time of plaintiff's alleged indebtedness to them. *Abercrombie v. Cullen*..... 515

Minimum Price:

See PUBLIC LANDS, 2.

Misrepresentation:

See FRAUD.

Mistake:

Basis of claim for adverse possession, see ADVERSE POSSESSION.
In transmission of telegram, see TELEGRAPHS AND TELEPHONES.

Modification:

Of lease by oral agreement, see LANDLORD AND TENANT, 1.
Of contract, by agent, see PRINCIPAL AND AGENT, 4.
Of contract for sale of land, see VENDOR AND PURCHASER, 1-3.

Monuments:

See BOUNDARIES.

Morgue:

As nuisance, see NUISANCE.

Mortgages:

Of personal property, see CHATTEL MORTGAGES.

1. MORTGAGES (22) — PAROL EVIDENCE AS TO DEED. Oral evidence is admissible to prove that an absolute deed was intended as a mortgage. *DuPont de Nemours Powder Co. v. Pederson*..... 335

Motive:

Competency of, see EVIDENCE, 4.
Of legislature in making appropriations, see STATES, 2.

Municipal Corporations:

See COUNTIES; DRAINS, 1; SCHOOLS AND SCHOOL DISTRICTS.

Weight of vehicles in, see CRIMINAL LAW, 1.

Conditional sale of property to be used by city, see SALES, 11.

1. MUNICIPAL CORPORATIONS (181)—SALES (183)—REMEDIES ON CONTRACTOR'S BONDS—MATERIALMEN UNDER CONDITIONAL SALES CONTRACT. The vendor in a conditional sales contract of machinery sold to a contractor for a municipal power plant may pursue the property under the contract, and is not restricted to a remedy by action upon the contractor's bond, under Rem. Code, § 1159, relating to security for laborers and materialmen furnishing supplies for public improvements. *Allis-Chalmers Mfg. Co. v. Ellensburg*..... 533
2. SAME (256)—VALIDITY OF ASSESSMENT—ESTOPPEL. The fact that a property owner petitioned for an improvement and made affidavit that the property was a public street will not estop him from maintaining an action to cancel the assessment when it is found that the property improved was not public property. *Allen v. Spokane*. 407
3. MUNICIPAL CORPORATIONS (264) — CONFIRMATION OF ASSESSMENTS—APPEAL—FILING TRANSCRIPT—EXCUSE FOR FAILURE. While the filing of a transcript within ten days under Rem. Code, § 7892-22, is a jurisdictional step in the taking of an appeal from the confirmation of an assessment roll, it will not work a dismissal of the appeal where timely demand was made upon the city clerk and the failure to file the same within time was due to the inability of the clerk to prepare the transcript. *In re Local Improvement Districts Numbers 29 to 37, Yakima County*..... 211
4. MUNICIPAL CORPORATIONS (269) — IMPROVEMENTS—ASSESSMENTS — ACTION TO SET ASIDE. A property owner, in an action to cancel a street assessment, may show that the property improved was not a public street, since the city cannot acquire the property unless the public necessity is judicially determined, nor unless its cost can be found in assessments or within the city's debt limit. *Allen v. Spokane* 407
5. MUNICIPAL CORPORATIONS (379, 390) — USE OF STREETS—COLLISION AT CROSSING—NEGLIGENCE. The negligence of the driver of an automobile in collision with a motorcycle at a street intersection is a question for the jury where there was evidence that, on reaching the crossing, the defendant first stopped, inviting the motorcyclist to pass in front, then started, inviting him to pass behind, and again started and stopped, when if he had not halted, he would have proceeded across in safety. *Clark v. Wilson*..... 127
6. SAME (379, 392)—MEETINGS AND CROSSINGS—INSTRUCTIONS. In an action for injuries sustained by a motorcycle policeman in collision with an automobile at a street intersection, where the view was unobstructed, instructions are proper which declare that, if defend-

Municipal Corporations—Continued.

- ant, as a reasonably prudent man, had reason to believe that plaintiff was a policeman, it was his duty to stop and allow him to pass, and that it was negligent for him to first stop to allow him to pass in front, and to then start up and drive in front of him. *Clark v. Wilson* 127
7. MUNICIPAL CORPORATIONS (380, 390) — USE OF STREETS—COLLISION AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY. It is negligence for the driver of an automobile to "cut the corner" in turning at a street intersection, in violation of law, especially where the streets were congested with traffic. *Stubbs v. Molberget*..... 89
8. SAME (383, 391)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The driver of an automobile, struck by another which illegally "cut the corner," is not guilty of contributory negligence in not anticipating that the other car would violate the law, but assumed that it would continue legally, and gave all his attention to a crowd of people congregated on the corner he was approaching. *Stubbs v. Molberget* 89
9. SAME (383, 391) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a motorcycle policeman traveling 35 or 40 miles in the line of his duty, where the view was unobstructed, in collision with an automobile at a street intersection, is a question for the jury, where he had the right of way, was not limited as to speed, and was misled by the indecision and repeated stopping and starting of the driver of the automobile. *Clark v. Wilson* 127
10. MUNICIPAL CORPORATIONS (420, 464)—TORTS—DEFECTIVE SIDEWALK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Notwithstanding plaintiff testified that her fall was caused by the "wet and slippery" condition of a sloping sidewalk, the negligence of the city is for the jury, where it appears that the city rendered the cleats useless by filling the intervals with a tar, pitch or asphalt composition which was slippery. *Hanson v. Seattle*..... 586
11. SAME (448) — DEFECTIVE SIDEWALK — PLEADING — ANSWER—SUFFICIENCY. In an action for a fall upon a sloping sidewalk, an answer that the sidewalk was given a coat of tar and sand to prevent slipping does not negative the possibility of negligence; since it does not show that it was properly applied or prevented slipping. *Hanson v. Seattle*..... 586
12. MUNICIPAL CORPORATIONS (485, 511) — CURRENT EXPENSE FUND—ERECTION OF CITY HALL. The cost of erecting a city hall does not come within and therefore cannot be paid out of the "current expense fund" created by Rem. Code, § 5140-3, for cities of the third class for the payment of current expenses. *State ex rel. Republic v. Harvey* 48

Municipal Corporations—Continued.

13. MUNICIPAL CORPORATIONS (525)—PUBLIC UTILITIES—BONDS—SALE AT DISCOUNT—POWERS OF CITY—STATUTES. Under Rem. Code, § 8008, authorizing a city to issue and sell bonds bearing interest not exceeding six per cent per annum, special fund utility bonds calling for five per cent interest semi-annually may be sold by the city at a discount that would yield six per cent interest, in the absence of any statute prohibiting sales at less than par. *Hill v. Seattle*.. 572
14. SAME (525). Such sales at less than par are not prohibited by the latter part of such section, which provides that the contract for the improvement may provide for payment only in bonds and warrants at par. *Hill v. Seattle*..... 572
15. SAME (525). Sales of five per cent below par so as to net six per cent per annum does not violate Rem. Code, § 8008, providing that the rate of interest shall not exceed six per cent per annum payable semi-annually. *Hill v. Seattle*..... 572
16. SAME (525). The objection to such a sale that the discount is payable in a lump sum, and violates the statute requiring semi-annual payments, is technical and goes largely to the form of the bonds. *Hill v. Seattle*..... 572
17. MUNICIPAL CORPORATIONS (565) — CLAIMS — PRESENTATION. The filing of a claim against a city is not a condition precedent to action the gist of which was to recover machinery conditionally sold to a contractor and installed in a city power plant, notwithstanding an alternative prayer in the complaint offering to take judgment against the city for the balance due on the purchase price, which it is alleged the city assumed and agreed to pay. *Allis-Chalmers Mfg. Co. v. Ellensburg* 533

Mutual Benefit Insurance:

See INSURANCE.

Negligence:

Damages in general, see DAMAGES.
 Measure of damages, see DAMAGES, 3.
 Inadequate and excessive damages, see DAMAGES, 4.
 Defects or obstructions in highways, see HIGHWAYS, 5, 6.
 For injuries to married woman, see HUSBAND AND WIFE, 2.
 Of employers, see MASTER AND SERVANT.
 Risks assumed by servant, see MASTER AND SERVANT, 5, 6, 16.
 Act of servant constituting negligence as against third persons, see MASTER AND SERVANT, 17.
 Causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 5-9.
 In operation of trains, see RAILROADS, 5-7.
 Accidents at railroad crossings, see RAILROADS, 5-7.

Negligence—Continued.

Of telegraph companies in delivery of messages, see TELEGRAPHS AND TELEPHONES.

1. NEGLIGENCE (3) — FIRES—LIABILITY—CARE TO PREVENT SPREADING. Liability for starting a fire on one's own land, which spread to adjoining property, must be based on negligence, i. e., failure to act as a reasonably prudent person would under like circumstances. *Lehman v. Maryott & Spencer Logging Co.*..... 319
2. SAME (3, 15) — FIRES — PROXIMATE AND INTERVENING CAUSE. A strong wind but for which no loss would have occurred, and which arose some days after a logging company had burned a camp-site and extinguished all fire except a smouldering root, is an intervening cause which relieves from responsibility for the original fire, even if defendant had been guilty of negligence. *Lehman v. Maryott & Spencer Logging Co.*..... 319
3. SAME (3, 38) — FIRES — FAILURE TO CONTROL — EVIDENCE — SUFFICIENCY. There is no evidence to justify a finding of negligence by a logging company in burning a camp-site under direction of a Federal forest ranger, where for two or three days there had been no fire except a smouldering root near the center of the camp which could not be extinguished, and an experienced watchman was left and visited the property hourly prior to the fire and discovered it soon after it broke out, and it could not be checked because of an unusual wind. *Lehman v. Maryott & Spencer Logging Co.*..... 319

Newly Discovered Evidence:

Ground for new trial, see CRIMINAL LAW, 5.

New Trial:

1. NEW TRIAL (23)—CONFLICTING EVIDENCE—DISCRETION. It is not an abuse of discretion to refuse a new trial for insufficiency of the evidence where the testimony was in direct conflict and made questions for the jury, which were submitted on instructions that were not excepted to. *Swafford v. Carnation Lumber & Shingle Co.*... 305
2. NEW TRIAL (23) — GROUNDS—CONFLICTING EVIDENCE. Error cannot be predicated upon the refusal to grant a new trial for insufficiency of conflicting evidence which made a case for the jury. *Heitmiller v. Prall*..... 382
3. SAME (32) — ABSENCE OF WITNESS—DILIGENCE. A party cannot complain of being deprived of a subpoenaed witness who departed before testifying, where there was no diligence to secure his attendance. *Bundy v. Dickinson*..... 52
4. NEW TRIAL (35) — NEWLY DISCOVERED EVIDENCE — MATERIALITY — DILIGENCE. A new trial for newly discovered evidence is properly denied where it would not likely affect the result, and no effort had

New Trial—Continued.

been made to secure the evidence although it was known to counsel that the witness might have knowledge of the facts. *Bundy v. Dickinson* 52

5. NEW TRIAL (40) — GROUNDS—NEWLY DISCOVERED EVIDENCE. It is not an abuse of discretion to refuse a new trial for newly discovered evidence as to the falsity of testimony given, where it came to the party's knowledge before the close of the trial and was not disclosed or made known until long afterwards; especially where it would only have been cumulative and at best of little weight. *Alverson v. Hooper*..... 510
6. SAME (49) — MISCONDUCT OF JURY. The denial of a new trial for misconduct of the jurors will not be disturbed where there were counter affidavits as to the credibility of certain affiants which were passed upon below. *Bundy v. Dickinson*..... 52

Nonresidence:

Appointment of, as administrator, see EXECUTORS AND ADMINISTRATORS, 1.

Notice:

Of settlement of bill of exceptions or statement of facts, see APPEAL AND ERROR, 9, 10.

Of application to revoke letters, see EXECUTORS AND ADMINISTRATORS, 2.

Defects or obstruction in highway, as affecting liability for negligence, see HIGHWAYS, 6.

To deliver possession of leased premises, see LANDLORD AND TENANT, 4.

Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 5, 6.

Constructive notice of sales contract, see SALES, 8.

Nuisance:

1. NUISANCE (2) — WHAT CONSTITUTES PRIVATE NUISANCE — UNDERTAKING ESTABLISHMENT—INJUNCTION. Under Rem. Code, §§ 943, 8309, defining nuisance, and adding to the common law definition a new element—"the comfortable enjoyment of one's property"—an undertaking establishment and morgue, conducted in an old dwelling out of repair in the residential section of the city in such a manner as to affect the peace of mind and destroy the property values of the neighborhood will be enjoined as a nuisance. *Goodrich v. Starrett* 437

Objections:

Review as dependent on objection made on trial, see APPEAL AND ERROR, 3.

On criminal appeals, see CRIMINAL LAW, 6.

Occupation:

Rights acquired by occupancy of public lands, see PUBLIC LANDS, 1.

Offenses:

See CRIMINAL LAW.

Officers:

Corporate officers, see CORPORATIONS, 6, 7.

Limitation of actions for salary, see LIMITATION OF ACTIONS, 2.

Mandamus to compel payment of warrants, see MANDAMUS, 3, 4.

Transmission of funds to state treasurer, see STATES, 1.

Opinion Evidence:

In criminal prosecution, see CRIMINAL LAW, 3.

In civil actions, see EVIDENCE, 13.

Oral Contracts:

See FRAUDS, STATUTE OF.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 1.

Original Promise:

To answer for debt, default or miscarriage of another, see FRAUDS, STATUTE OF, 1.

Parent and Child:

Adoption of children, see ADOPTION.

Custody of children pending appeal, see APPEAL AND ERROR, 6.

Parties:

Entitled to alleged error, see APPEAL AND ERROR, 12.

Taxpayers, effect of judgment, see APPEAL AND ERROR, 20.

In action on indemnity bond, see INDEMNITY, 3.

Joint interest, see JOINT ADVENTURES.

Action by agent, see PRINCIPAL AND AGENT, 7.

1. PARTIES (1)—CAPACITY TO SUE—MARRIAGE. A divorced woman had legal capacity to sue for breach of promise where the complaint alleged that she was unmarried at all times mentioned in the complaint. *Bundy v. Dickinson*..... 52

Partnership:

See JOINT ADVENTURES.

1. PARTNERSHIP (28, 67) — ACQUIRING ADVERSE TITLE — ESTOPPEL — RETIRING PARTNER. Where a partnership agreement for logging certain tracts of lands provided for purchase of the timber at stated prices, and part of the timber on a tract was cut before its purchase,

Partnership—Continued.

treating the timber as a partnership asset and its price as a liability, a retiring partner is estopped to acquire and assert an adverse title to the timber superior to the rights which he sold to his co-partner upon dissolution of the partnership. *Carey v. Wilsey*.. 679

2. PARTNERSHIP (87-89) — ACCOUNTING—RIGHT TO—DEFENSES—WANT OF ASSETS. An accounting between partners will not be decreed when there were no assets and no liabilities and no indebtedness due to the plaintiff from the firm or other partner and it would be of no benefit to any one. *Baker v. Tennent*..... 663

Payment:

Of municipal bonds, see MUNICIPAL CORPORATIONS, 13-16.

Pendency of Action:

As ground for abatement, see ABATEMENT AND REVIVAL, 1.

Permanent Partial Disability:

See MASTER AND SERVANT, 7, 10.

Personal Injuries:

See ASSAULT AND BATTERY.

Inadequate and excessive damages, see DAMAGES, 4.

Right of action for injury to married woman, see HUSBAND AND WIFE, 2.

To employee or third person, see MASTER AND SERVANT.

Collision with automobile, see MUNICIPAL CORPORATIONS, 5-9.

From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 10, 11.

To persons on railroad track, see RAILROADS, 6-7.

To traveler on highway crossing railroad, see RAILROADS, 7.

Personal Property:

Measure of damages for injuries to personal property, see DAMAGES, 3.

Oral sale of personalty, see FRAUDS, STATUTE OF, 2.

Photographs:

Of mortgaged abstract books, see CHATTEL MORTGAGES, 3, 5.

Plaintiffs:

See PARTIES.

Pleading:

Joinder of causes of action, see ACTION, 1.

Necessity for statement of facts as to rulings on pleadings, see APPEAL AND ERROR, 8.

Pleading—Continued.

Review, prejudicial effect of variance, see **APPEAL AND ERROR**, 13.
 Sufficiency of complaint, see **ASSAULT AND BATTERY**.
 Condemnation proceedings, see **EMINENT DOMAIN**, 2.
 To establish highways, see **HIGHWAYS**, 1.
 Suit for injunction, see **INJUNCTION**.
 For unlawful detainer by tenant, see **LANDLORD AND TENANT**, 6.
 In action by servant for personal injuries, see **MASTER AND SERVANT**, 13.
 Sufficiency of answer in action for defect in street, see **MUNICIPAL CORPORATIONS**, 11.
 Allegations showing plaintiff's capacity to sue, see **PARTIES**, 1.
 Release, see **RELEASE**.
 Replevin, see **REPLEVIN**, 2.
 Complaint in action for goods sold, see **SALES**, 1.
 Striking out irrelevant matter, see **VENDOR AND PURCHASER**, 4.

1. **PLEADING (22)—CONCLUSIVENESS OF ALLEGATIONS ON PARTY PLEADING.** In an action to recover prospective profits from a contract to furnish hotel garbage for fattening hogs, the defendant cannot claim that the consequences were not within the contemplation of the parties, where his answer admits facts showing notice of the purpose for which the garbage was to be used. *Nelson v. Davenport*. 259
2. **PLEADING (72, 147)—JUDGMENT ON PLEADINGS—ADMISSION.** Under Rem. Code, § 278, providing for judgment on the pleadings on plaintiff's failure to reply, read in connection with other parts of the practice act allowing amendments, relief from defaults, and for trial on the merits when justice demands it, a reply admitting the mutual rescission of an executory contract for the sale of lands does not conclusively presume an obligation to return the purchase price so as to entitle defendant to judgment on the pleadings. *Strang v. Person* 503
3. **PLEADING (72, 149) — REPLY — ADMISSIONS — JUDGMENT ON PLEADINGS.** Where defendant set up a mutual rescission of an executory contract for the sale of lands, a reply admitting that the contract was "rescinded and forfeited" and denying that defendant was damaged, is not such an unqualified admission of the facts as to entitle plaintiff to judgment on the pleadings, after a trial on the merits, in view of the power of the court to relieve from defaults or consider the pleading amended to conform to proofs. *Strang v. Person* 503
4. **PLEADING (90) — DEMURRER—SEPARATE CAUSE OF ACTION.** A demurrer for improperly uniting two causes of action, must, under Rem. Code, § 259, subd. 5, be sustained, unless the complaint did not state sufficient facts to constitute one of the causes attempted to be stated. *Kontick v. Champneys*..... 35

Pleading—Continued.

5. PLEADING (104, 114)—AMENDMENT TO CONFORM TO PROOF—EFFECT. After allowance of a trial amendment to the complaint to conform to proof, plaintiff is entitled to the benefits of the proofs which supported the complaint as amended. *Hershey v. Hanauer*..... 498
6. PLEADING (104, 121) — AMENDMENT — TO CONFORM TO PROOF — REPLY. Where a trial on the merits was entered into and proceeded without objection to the form of a reply containing an admission, upon oral objection at the trial, the court could consider it amended to conform to proofs, and did so in effect by overruling a motion for judgment and determining the case on the merits. *Strang v. Person* 503
7. PLEADING (112, 113)—AMENDMENT—CHANGE IN CAUSE OF ACTIONS. In a tenant's action for damages for breach of the landlord's contract to install a pump, it is not error, at the conclusion of the evidence, to refuse an amendment of the complaint to show fraud and false representations inducing plaintiff to enter into the lease, as it would change the form of action and require a retrial. *Heitmiller v. Prall* 382
8. PLEADING (118) — ANSWER—AMENDMENT. It is not error to refuse to allow an answer to be amended at the trial, where it is not plain in what respect the answer would have been amended to state a valid defense. *Western Farquhar Machinery Co. v. Pierce*.... 621
9. PLEADING (132-1) — COPIES—"ITEMS OF ACCOUNT." Damages for breach of a land contract, claimed upon a cross-complaint, are not "items of account," within Rem. Code, § 284, providing that, where a pleading fails to set forth a copy of the instrument of writing or the items of an account relied upon, the party shall, upon demand, file a verified copy thereof or be precluded from giving evidence thereof. *Kelly v. Hinkhouse*..... 93
10. PLEADING (163)—ELECTION—INCONSISTENT DEFENSES. In an action to recover money paid on a land contract, pursuant to an alleged mutual cancellation, defenses of a surrender in consideration of a release, and that the sums paid and improvements made by the purchasers were not equal to the rental value and damages committed, are not inconsistent in the sense of requiring an election. *Linville v. Wiedrich*..... 1
11. PLEADING (181-189)—VARIANCE—OWNERSHIP OF "RIGHT OF WAY"—MATERIALITY. In an action against a county and a railroad company for injuries sustained upon a county sidewalk at the railway crossing, failure to prove the company's ownership of the property is not a fatal variance under a complaint merely alleging that the company owned and maintained "a right of way" across the highway; especially where no surprise was claimed. *Bullock v. Yakima Valley Transportation Co.*..... 413

Pledges:

See CHATTEL MORTGAGES.

Policy:

Of insurance, see INSURANCE.

Possession:

See ADVERSE POSSESSION.

Of mortgagee as affecting title of mortgagor, see CHATTEL MORTGAGES, 2.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; DEPOSITIONS; GARNISHMENT; INJUNCTION; LIMITATION OF ACTIONS; PLEADING; REPLEVIN; VENUE.

Preferences:

In fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 14-19.

Prescription:

Acquisition of rights, see ADVERSE POSSESSION.

Presentment:

Of claim against county, see COUNTIES, 3-6.

Of claim against municipality, see MUNICIPAL CORPORATIONS, 17.

Presumptions:

As to rejection of claim against county, see COUNTIES, 5.

Prevailing Party:

Entitled to costs, see COSTS, 3.

Principal and Agent:

See BROKERS.

Representation of corporation by agent, see CORPORATIONS, 6.

Admissions by agent as evidence, see EVIDENCE, 6.

Insurance agents, see INSURANCE, 1-4.

1. PRINCIPAL AND AGENT (6)—EVIDENCE OF AGENCY—ADMISSIBILITY. Where there was no proof that an agent had made a contract to buy certain junk, or had authority to do so, it is not error to exclude evidence of agency generally. *Bernstein v. Schwartz*.... 271
2. PRINCIPAL AND AGENT (34)—AUTHORITY OF AGENT—SALES—EVIDENCE—SUFFICIENCY. Where the lease of a box factory required the lessee to finish and market certain stock on hand belonging to the lessor, receiving therefor actual cost and ten per cent added to-

Principal and Agent—Continued.

gether with reasonable commissions, the lessee was clothed with apparent authority to sell the stock and receive payment for the same. *Petersen v. Pacific American Fisheries*. 63

3. SAME (35, 42)—COLLECTION OF DEBTS—POWERS OF AGENT—REVOCA-TION—EVIDENCE—SUFFICIENCY. In such case, the fact that one of the lessors was referred to for an inventory and assisted in negotiating and consummating the sale did not revoke the lessee's authority to make the sale and collection, especially where the buyer had reason to suppose that such lessor was acting only as agent for the owner and not as owner. *Petersen v. Pacific American Fisheries*. 63
4. SAME (37) — POWERS — COLLECTING AGENT — POWER TO MODIFY. A collecting agent presumptively has no authority to rescind a contract, and where he was advised by wire not to do so, the jury is properly instructed that, as a matter of law, he had no power to modify the contract. *Bernstein v. Schwartz*. 271
5. SAME (38)—APPARENT AUTHORITY. As between one of two innocent parties, the loss must always fall upon the principal who has clothed an agent with apparent authority and enabled him to obtain an advantage over an innocent purchaser. *Petersen v. Pacific American Fisheries* 63
6. SAME (39)—EVIDENCE AS TO AUTHORITY—ADMISSIBILITY. Upon an issue as to an agent's authority to buy junk for defendant, a special agency to make contracts with another particular person is immaterial. *Bernstein v. Schwartz*. 271
7. PRINCIPAL AND AGENT (50)—UNDISCLOSED PRINCIPAL—RIGHT OF ACTION. The fact that the general manager and agent of the owner was named as the obligee in a contractor's bond as the owner does not preclude the actual owner from bringing an action on the bond in its own name. *Columbia Security Co. v. Aetna Accident & Liability Co.* 116

Principal and Surety:

See INDEMNITY.

Sufficiency and competency of sureties on appeal bonds, see APPEAL AND ERROR, 4.

Privilege of Witness:

See WITNESSES, 2.

Process:

See MANDAMUS.

Effect of appearance, see APPEARANCE.

Profits:

Loss of profits as element of damages, see DAMAGES, 1, 5-7.

Promise of Marriage:

See BREACH OF MARRIAGE PROMISE.

Proof:

Of loss insured against, see INSURANCE, 9, 10.

Property:

See MINES AND MINERALS.

Taking for public use, see EMINENT DOMAIN.

Effect of reservation of standing timber, see LOGS AND LOGGING.

Province of Court and Jury:

In civil actions, see TRIAL, 3-5.

Provisos:

Construction of, see STATUTES, 5.

Proximate Cause:

See FIRES, 2.

Public Debt:

See COUNTIES, 2.

Public Improvements:

By cities, see MUNICIPAL CORPORATIONS, 2-4.

Public Lands:

1. PUBLIC LANDS (14)—RIGHTS ACQUIRED BY ENTRY—VESTED RIGHTS—PRICE. The only vested right that a successful contestant of a homestead entry has is the preference right for thirty days to enter upon the lands; and the general land office may, between the date of contract and date of entry, change the rules relating to the manner of acquisition of government lands, and can require that timber lands previously sold at \$2.50 per acre shall be appraised and sold at the appraised value. *Brown v. Baker*..... 161
2. SAME (19)—TIMBER AND STONE LANDS—"MINIMUM" PRICE—RIGHT TO CHANGE. 20 Stat. at L. 89, providing that the minimum price at which lands chiefly valuable for timber may be sold does not prevent the general land office from fixing a greater price and requiring an appraisalment and sale at the appraised value. *Brown v. Baker* 161
3. PUBLIC LANDS (42)—RAILROAD GRANTS—INDEMNITY AND LIEU LANDS—OPTIONAL RELINQUISHMENT. The railroad company's relinquishment and selection of lieu lands, when the extension of the public survey discloses that settlers are occupying odd sections granted to the company, is entirely optional with the company, under the Wilson act, 30 Stat. at Large 620. *Northern Pac. R. Co. v. Mueller* 684

Public Lands—Continued.

4. **PUBLIC LANDS (75-83) — DISPOSAL OF GRANTED LANDS — GRAZING LEASE—POWERS OF COMMISSIONER.** Subject to the Congressional restriction that no more than one section of grazing land be leased to one person, the commissioner of public lands may lease granted lands to the highest bidder, under Rem. Code, § 6681, or exercise his discretion in rejecting all bids under § 6688. *State ex rel. McKee v. Savidge* 292
5. **SAME (75-83).** Under Rem. Code, § 6612, authorizing the commissioner of public lands to review and reconsider his public acts, and Id., § 6616, providing for an appeal to the supreme court, the commissioner of public lands acts within his powers and discretion in letting grazing leases of less than one section to the highest bidders who are apparently qualified, and cannot be mandamusd at the suit of other bidders who made no demand for a hearing or offer to prove that the highest bidders were disqualified. *State ex rel. McKee v. Savidge*..... 292

Public Schools:

See SCHOOLS AND SCHOOL DISTRICTS.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Quantum Meruit:

For highway work, see HIGHWAYS, 3.

Question for Jury:

In civil actions in general, see TRIAL, 2-4.

Railroads:

Damages to avoid forfeiture of right of way by breach of covenant, see COVENANTS.

Injuries to employee, see MASTER AND SERVANT.

1. **RAILROADS (18) — COVENANTS AND CONDITIONS—SUBSTANTIAL PERFORMANCE.** The covenants in a grant of land to a railroad whereby the company agreed to operate the road and maintain a station are substantially performed by compliance with the contract for a period of twenty-five years; and abandonment of the road thereafter does not give rise to an action for damages for breach of the covenant. *Scheller v. Tacoma Railway & Power Co.*..... 348
2. **RAILROADS — HIGHWAY CROSSINGS — MAINTENANCE OF SIDEWALK — LIABILITY—STATUTES.** Rem. Code, § 8730, relating to railroad crossings, being entitled an act compelling railroads to fence their right of way and to protect the owners of stock and declaring the law of negligence, has no application to the maintenance of sidewalks at

Railroads—Continued.

- railroad crossings for the convenience of pedestrians. *Bullock v. Yakima Valley Transportation Co.*..... 413
3. SAME. Rem. Code, § 9080, authorizing railroads to cross highways, has no reference to the maintenance of crossings and does not affect the common law duty to keep the crossing in reasonable repair. *Bullock v. Yakima Valley Transportation Co.*..... 413
4. SAME—HIGHWAY CROSSINGS—SIDEWALKS—COMMON LAW LIABILITY FOR MAINTENANCE. At common law, a railroad company crossing a highway by statutory permission owed the duty to maintain that portion of the highway used and occupied by it, including sidewalks and approaches necessary for a reasonably safe crossing. *Bullock v. Yakima Valley Transportation Co.*..... 413
5. RAILROADS—ACCIDENT TO TRAINS—COLLISION—CONTRIBUTORY NEGLIGENCE. A collision between an electric interurban car and a railroad flat car, using by agreement the same tracks, was due to the palpable contributory negligence of the electric motorman in running his car at speed through a dense fog past a siding when he had been ordered to operate his car under control. *North Coast Power Co. v. Chehalis & Cascade Railway*..... 591
6. RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—QUESTION FOR JURY. The positive testimony of witnesses that a crossing whistle was given by an interurban car does not, as a matter of law, overcome evidence of witnesses who could have heard the signal if it had been given and who testified that they heard none. *Kent v. Walla Walla Valley Railway Co.* 251
7. SAME (64-66)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The driver of an automobile is not guilty of contributory negligence, as a matter of law, in failing to stop before driving across an interurban track, where he both looked and listened, his car was making very little noise, his view was obstructed, and when the train first came in view, he was so close to the track as to be unable to stop in time to avoid the collision. *Kent v. Walla Walla Valley Railway Co.* 251

Ratification:

- Of unauthorized acts by corporation, see CORPORATIONS, 7.

Real Estate Agents:

See BROKERS.

Real Property:

Adverse possession, see ADVERSE POSSESSION.
Conveyance, see VENDOR AND PURCHASER.

Reclamation Districts:

See DRAINS.

Records:

- Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 8-11.
- Certifying on certiorari, see **EMINENT DOMAIN**, 3.
- Conditional sale contract, see **SALES**, 7, 8.

Recovery:

- Measure and amount, see **DAMAGES**.

Registration:

- Of voters, see **STATUTES**.

Rehearing:

- See **NEW TRIAL**.

Release:

- Of joint tortfeasor, see **JUDGMENT**, 4.
- Verdict in favor of third person as release of master, see **MASTER AND SERVANT**, 17.
- 1. **RELEASE (7)—PLEADING.** A release relied upon in an action for breach of promise must be affirmatively pleaded as a defense. *Bundy v. Dickinson*..... 52

Relief Bills:

- Encroachment on legislative powers as to, see **CONSTITUTIONAL LAW**, 2.

Remedies:

- For personal injuries under workmen's compensation act, see **MASTER AND SERVANT**, 7-11.

Remote Damages:

- See **DAMAGES**, 1, 5-7.

Removal:

- Power to remove officers or agents, see **CORPORATIONS**, 6.
- Time for removal of standing timber, see **LOGS AND LOGGING**, 1.

Removal of Causes:

- Change of venue or place of trial, see **VENUE**.

Reopening Case:

- For further evidence, see **TRIAL**, 1.

Replevin:

- 1. **REPLEVIN (6) — TENDER (10-1) — TITLE OF PLAINTIFF — EFFECT OF TENDER.** Replevin presupposes title in the plaintiff, and does not lie on timely tender of the price of a donkey engine; but the remedy is for breach of contract or specific performance. *Hays v. Bashor*. 491

Replevin—Continued.

2. REPLEVIN (22) — PLEADING—VENUE. Where the sheriff's return shows that property replevied was found in the county, error in failing to lay the venue in the complaint is cured. *Western Farquhar Machinery Co. v. Pierce*..... 621

Reply:

See PLEADING, 3.

Representation:

Representation of corporations by officers or agents, see CORPORATIONS, 6.

Requests:

For instructions in civil actions, see TRIAL, 7.

Reservation:

Of title to standing timber, see LOGS AND LOGGING, 1.
In state lease, see MINES AND MINERALS, 1.

Res Gestae:

See EVIDENCE, 6.
As to dying declarations, see HOMICIDE, 2, 3.

Res Judicata:

See JUDGMENT, 2, 3.

Restitution:

Under Federal relief act, see ARMY AND NAVY.

Reversion:

Of lessor, see LANDLORD AND TENANT, 2.

Review:

By higher court on appeal for error or irregularities, see APPEAL AND ERROR, 12-19.
Of drainage district proceedings, see DRAINS.

Revocation:

Of letters testamentary, see EXECUTORS AND ADMINISTRATORS, 2.
Of authority, see PRINCIPAL AND AGENT, 3.

Right of Way:

Damages to avoid forfeiture by breach of covenants, see COVENANTS.
Of railroads, see RAILROADS, 1.

Risks:

Assumed by employee, see MASTER AND SERVANT, 5, 6, 16.

Roads:

Defects in streets in cities, see MUNICIPAL CORPORATIONS, 10, 11.

Salary:

Limitation of actions for, see LIMITATION OF ACTIONS.

Sales:

Under foreclosure, see CHATTEL MORTGAGES, 5.

Of corporate stock, see CORPORATIONS, 3-5.

Parol evidence to vary contract of sale, see EVIDENCE, 11.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.

Of mines, see MINES AND MINERALS.

Rights of vendor of property sold for city, see MUNICIPAL CORPORATIONS, 1.

Of municipal bonds, see MUNICIPAL CORPORATIONS, 13-16.

Apparent authority of agent as to sales, see PRINCIPAL AND AGENT, 2.

Of real property, see VENDOR AND PURCHASER.

1. SALES (12)—CONTRACTS BY CORRESPONDENCE. There was no meeting of the minds and no completed contract by correspondence for the purchase of poles where, although prices quoted were apparently accepted, in view of changes and new conditions which appeared in each interchange, the buyer, before mailing acceptance, requested telegraphic reply, and the seller then countered by materially changing date of delivery, terms of payment and price, and the changes were never agreed to. *Schulze v. General Electric Co.*..... 401
2. SALES (35)—TIME FOR DELIVERY. Where a contract for the sale of wheat does not state the time for delivery, delivery may be made within a reasonable time. *Jones-Scott Co. v. Ellensburg Milling Co.* 73
3. SALES (89)—TENDER (10-1)—TRANSFER OF TITLE—EFFECT OF TENDER. Under an agreement to transfer a donkey engine upon payment of an agreed price within a certain time, timely tender does not operate to transfer the title. *Hays v. Bashor*..... 491
4. SALES (129)—ACTIONS FOR PRICE—COMPLAINT—PERFORMANCE OF CONTRACT. A performance of a contract for the sale of wheat and the buyer's refusal to accept are sufficiently shown by a complaint alleging that the seller bought the grain for the purpose of supplying the buyer and held it subject to his order until he repudiated and disavowed the contract and refused to receive it. *Jones-Scott Co. v. Ellensburg Milling Co.*..... 73
5. SALES (165) — WARRANTY — BREACH — MEASURE OF DAMAGES. The measure of damages for breach of warranty as to the quality of a car of lumber sold is the difference between the actual value at the time and place of sale and its value at the same time and place

Sales—Continued.

- had it been as warranted. *Connor & Groger, Inc. v. Forest Mills of British Columbia, Limited*..... 468
6. SAME (165). The measure of damages for breach of warranty as to the quality of lumber, sold upon a bill of lading without opportunity to inspect it and bought for resale at Duluth, Minnesota, cannot be shown by proof of its actual value in New York or Pennsylvania, where the seller had no notice it was to be diverted to any other market. *Connor & Groger, Inc. v. Forest Mills of British Columbia, Limited*..... 468
7. SALES (176) — CONDITIONAL SALES — RECORDING — SIGNATURE OF VENDOR. Under Rem. Code, § 3670, requiring all conditional sales contracts to be signed by the vendor and vendee, a contract is not sufficiently signed by the vendor by appending at the foot in type-writing as follows: "Times Square Garage, By.....Vendor" *Kennerly v. Northwestern Junk Co.*..... 656
8. SAME (176, 178)—CONDITIONAL SALES — RECORDING — ACTUAL NOTICE. Constructive notice by recording a conditional sales contract is not essential to protect the vendor's title, where the city had actual notice, prior to installation, that the machinery for a power plant was sold to the contractor under a conditional sales contract reserving title in the vendor, and that the purchase price was not paid. *Allis-Chalmers Mfg. Co. v. Ellensburg*..... 533
9. SALES (177)—CONDITIONAL SALES—TITLE OF VENDOR—ATTACHING PROPERTY TO REAL ESTATE. The title to machinery conditionally sold to be installed in a municipal power plant does not pass to the city on attaching the machinery so as to become part of the real estate, contrary to the express terms of the conditional sales contract. *Allis-Chalmers Mfg. Co. v. Ellensburg*..... 533
10. SALES (177, 178) — CONDITIONAL SALES — OPERATION AS TO THIRD PERSONS—TRANSFER OF TITLE. The reserved title of the vendor of machinery under a conditional sales contract is not affected by the fact that it was knowingly purchased by a contractor to be installed in a municipal power plant; especially where the contract did not authorize the vendee to dispose of the property to the city, but expressly reserved title until fully paid for "whatever may be the mode of its attachment to realty or otherwise." *Allis-Chalmers Mfg. Co. v. Ellensburg*..... 533
11. SALES (180, 183)—CONDITIONAL SALES—ELECTION OF REMEDIES BY SELLER—AGAINST THIRD PERSONS. Where machinery was conditionally sold by plaintiff to a contractor to be installed in a municipal power plant, a complaint primarily seeking recovery of the machinery after it was installed, but alleging that the city agreed and assumed to pay the balance due, and in the prayer presenting an alternative for the recovery of the balance due upon the purchase

Sales—Continued.

- price, does not show an election on the part of plaintiff to waive title to the machinery and sue for the price. *Allis-Chalmers Mfg. Co. v. Ellensburg*..... 533
12. **SALES (182) — CONDITIONAL SALES — DEFAULT IN PAYMENT — EVIDENCE—SUFFICIENCY.** The weight of the evidence sustains findings that the purchaser of a sawmill under a conditional sales contract was in default, entitling the vendors to forfeit the contract, notwithstanding conflicting evidence as to a verbal extension of time, there being evidence that the extension was for but two weeks, and that the purchaser defaulted on demand made thereafter. *Johnson v. Clements* 332

Sales Price:

See **BROKERS, 3.**

Same Transaction:

Joinder of actions, see **ACTION, 1.**

Satisfaction:

See **RELEASE.**

Of judgment, see **JUDGMENT, 4.**

Of claims by owner, see **MECHANICS' LIENS.**

Schools and School Districts:

1. **SCHOOLS AND SCHOOL DISTRICTS (7-1-9)—BOUNDARIES—ALTERATION—PETITION—REQUISITES.** Upon petition to the county school superintendent for a change of school district boundaries, the superintendent cannot radically depart from the petition and transfer from one district to another territory not described in the petition, except as necessary to correct the descriptions. *State ex rel. Calouri v. Stratton* 485
2. **SCHOOLS AND SCHOOL DISTRICTS (11)—BOUNDARIES—ALTERATION—REVIEW OF DECISION.** Under Rem. Code, § 4711, of the school code, providing that decisions on appeal by the county commissioners shall be final unless set aside by a court of competent jurisdiction in an action brought to review the same, certiorari lies to review decisions on appeal from the county superintendent, notwithstanding the earlier section 4707 provides that decisions on appeal by the board shall be final. *State ex rel. Calouri v. Stratton*..... 485
3. **SAME (11).** Under Rem. Code, § 4707, providing for appeals from decisions of the county superintendent to the county commissioners, and § 4711, providing for review by the courts of the latter, appeal lies to the board from the school superintendent, and certiorari lies to the courts from the board but not from the school superintendent. *State ex rel. Calouri v. Stratton*..... 485

Schools and School Districts—Continued.

4. SCHOOLS AND SCHOOL DISTRICTS (29-1)—TORTS—ACTIONS—RIGHT TO MAINTAIN—STATUTES. Laws 1917, p. 332, providing that no action shall be brought or maintained against a school district for non-contractual acts or omissions of officers or employees relating to playgrounds, applies to pending actions that had accrued prior to the enactment of the law. *Batley v. School District No. 49*..... 612

Secondary Evidence:

In civil actions, see EVIDENCE, 6, 7.

Secretary of State:

Certified copy by, as evidence, see CRIMINAL LAW, 2.

Servants:

See MASTER AND SERVANT.

Settlement:

See RELEASE.

Of bill of exceptions or statement of facts, see APPEAL AND ERROR, 9, 10.

By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 5.

By guardian of infant, see GUARDIAN AND WARD, 3.

Shall:

Construction of, see DEPOSITARIES.

Shares:

Of corporate stock, see CORPORATIONS, 3-5.

Shipping:

Jurisdiction over lien on ship, see APPEARANCE.

Ships:

Venue of action to enforce lien, see COURTS, 1.

Sidewalks:

Liability of county to maintain, see HIGHWAYS, 5, 6.

Action for defects, see MUNICIPAL CORPORATIONS, 11, 12.

Signals:

On approaching railroad crossings, see RAILROADS, 6.

Signatures:

To conditional sales contract, see SALES, 1.

Solvency:

False representations as to solvency of corporation, see FRAUD, 2.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 9-11.

States:

Power in regard to interstate commerce, see **COMMERCE**.

Legislative power, see **CONSTITUTIONAL LAW**.

Courts, see **COURTS**.

Depositary, term of appointee, see **DEPOSITARIES**.

Lease of state mineral lands, see **MINES AND MINERALS**, 1.

1. **STATES (23-1)—FISCAL MANAGEMENT—COLLECTION AND CUSTODY OF FUNDS.** Neither Rem. Code, § 5029, requiring state officers authorized to collect or receive state moneys to make daily deposits of the money collected, nor other statutes defining the duties of the state auditor and treasurer, has any application to moneys received by the Veterans' Welfare Commission, created by Laws 1919, p. 33, for the purpose of aiding veterans of the late war and which appropriated \$500,000 for such aid, but the act authorizes the commission to make loans and use the funds and repayments in their discretion for the benefit of soldiers and sailors. *State ex rel. Thompson v. Powell* 561
2. **STATES (26, 27) — APPROPRIATIONS — REQUISITES — OPERATION AND EFFECT.** The courts cannot inquire into the motives or impeach the judgment of the legislature in appropriating in the general appropriation bill the sum of \$5,000 for the relief of Governor Lister, notwithstanding the nature of the service or value given to the state is not stated in the bill. *State ex rel. Lister v. Clausen*..... 146

Statutes:

See **DRAINS; FRAUDS, STATUTE OF**.

Presumptions as to statutes of another state, see **EVIDENCE**, 1-3.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Retroactive effect of amendment, see **MASTER AND SERVANT**, 9.

1. **STATUTES (2-4)—INITIATIVE AND REFERENDUM — WHO ARE "LEGAL VOTERS."** Under Rem. Code, § 4971-12, providing for the certification of the signatures of legal voters upon initiative and referendum petitions, "legal voters" include only persons having the constitutional qualifications who are registered upon the poll books and not cancelled by failure to vote; in view of Const., art. 6, § 7, authorizing a registration law, and Rem. Code, § 4771-2 enacted pursuant thereto, which provides that, in cities where registration is required, citizens are not entitled to vote if unregistered, or if, having been registered, they suffered their names to be cancelled by failure to vote. *State ex rel. Mullen v. Howell*..... 340
2. **STATUTES (18)—SUBJECT AND TITLE—CARRIERS—WORKMEN'S COMPENSATION ACT.** Section 19 of Laws of 1917, p. 96, excluding employees of carriers engaged in interstate and intrastate commerce from the operation of the industrial insurance act, is germane to and sufficiently included in the title, "Relating to the compensation of injured workmen," since the title need not be an index to the

Statutes—Continued.

body of the act or express all details of the subject dealt with.
Archibald v. Northern Pac. R. Co...... 97

3. STATUTES (62)—CONSTRUCTION—CONFLICTING SECTIONS. Rem. Code, § 4711, of the school code, being later in time, controls earlier sections in the same code, so far as there is conflict. *State ex rel. Calouri v. Stratton*..... 485
4. STATUTES (73)—CONSTRUCTION AS MANDATORY. Rem. Code, § 5072, providing that county treasurers "shall" annually designate a depository, is not mandatory as to requiring annual appointments; the time for the performance of an act generally being directory, and depending on the spirit as well as the letter of the law. *National Surety Co. v. Campbell*..... 596
5. STATUTES (74)—CONSTRUCTION—PROVISOS. A proviso attached to a statute is a restraint upon or exception to it and does not extend the scope of the class of persons that come within it. *Tatum v. Marsh Mines Consolidated*..... 367

Stay:

Of proceedings under Federal relief act, see ARMY AND NAVY.

Stipulations:

1. STIPULATIONS (2)—TRIAL (100-1)—REQUESTS FOR INSTRUCTIONS. A stipulation that the court may instruct the jury orally does not waive the requirement that requests for instructions must be made in due time and in writing. *Hanson v. Seattle*..... 586

Stock:

Corporate stock, see CORPORATIONS, 3-5.

Stock in Trade:

Validity of mortgage on, see CHATTEL MORTGAGES, 2.

Stockholders:

Of corporations, see CORPORATIONS, 2-5.

Street Railroads:

See RAILROADS, 5-7.

Streets:

See MUNICIPAL CORPORATIONS, 5-9.

Support:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 3.

Taxation:

Municipal improvements, see MUNICIPAL CORPORATIONS, 2-4.

Taxation—Continued.

1. **TAXATION (59, 210)—VALUATION OF PROPERTY—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY.** An assessment for taxation is so excessive as to be constructively fraudulent, where like property on four sides was assessed only one-fourth to one-seventh as much, and the assessor employed a minimum rate without considering the fair market value, which other evidence showed was only one-fifth as much as the assessment. *Titlow v. Pierce County*..... 633

Taxpayers:

Relief to, as class, see **APPEAL AND ERROR**, 20.

Telegraphs and Telephones:

Regulation of telegraph companies, see **COMMERCE**.

1. **TELEGRAPHS AND TELEPHONES (9)—MESSAGES—LIABILITY FOR MISTAKES.** Under U. S. Comp. St. 1913, §§ 8581, 8583, authorizing telegraph companies to classify messages into repeated and unrepeatd messages and to charge different rates for the same, a company would not be liable for a mistake in an unrepeatd message, stipulated on the back of the telegraph blank to have been sent without liability for mistake, if the charges were just and reasonable, regardless of state laws. *Rasher-Kingman-Herrin Co. v. Postal Telegraph-Cable Co.*..... 543

Tender:

In action for recovery of personal property, see **REPLEVIN**, 1.

Effect of as transfer of title to goods sold, see **SALES**, 3.

Timber:

Cutting and sale of timber, see **LOGS AND LOGGING**, 1.

Lands, see **PUBLIC LANDS**, 1.

Time:

For serving statement of facts on appeal or error, see **APPEAL AND ERROR**, 9, 10.

For settlement of case on appeal, see **APPEAL AND ERROR**, 9, 10.

To sue for unlawful detainer of demised premises, see **LANDLORD AND TENANT**, 6.

Removal of standing timber, see **LOGS AND LOGGING**, 1.

Delivery of goods sold, time for compliance with order, see **SALES**, 2.

To move for change of venue, see **VENUE**.

Title:

Abstracts of title, mortgage on books, see **CHATTEL MORTGAGES**, 3, 5.

Of lessor, see **LANDLORD AND TENANT**, 2.

To mineral location, see **MINES AND MINERALS**, 2.

When passes to homesteader, see **PUBLIC LANDS**, 1.

To railroad land, see **PUBLIC LANDS**, 3.

Title—Continued.

- Right of way, see RAILROADS, 1.
- Sufficiency of title to support replevin, see REPLEVIN, 1.
- To goods sold, see SALES, 3.
- When passes under conditional sale delivery, see SALES, 9.

Torts:

- See ASSAULT AND BATTERY; FRAUD; NUISANCE; SCHOOLS AND SCHOOL DISTRICTS, 4.
- Vested right in, see CONSTITUTIONAL LAW, 1.
- Damages, inadequate or excessive, see DAMAGES, 4.
- Injuries caused by defects or obstructions in road, see HIGHWAYS, 5, 6.
- Injuries by employees, see MASTER AND SERVANT, 7-9.
- Negligent operation of railroads, see RAILROADS, 5-7.
- Failure to deliver messages, see TELEGRAPHS AND TELEPHONES.

Transcripts:

- Of record for purpose of review, see APPEAL AND ERROR, 8-11.
- Time for filing on appeal from assessment, see MUNICIPAL CORPORATIONS, 3.

Transfer:

- Of corporate shares, see CORPORATIONS, 3-5.

Trees:

- Cutting and sale of timber, see LOGS AND LOGGING, 1.

Trespass:

- To the person, see ASSAULT AND BATTERY.
- Restraining trespass, see INJUNCTION.

Trial:

- Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 3.
- Variance, when immaterial, see APPEAL AND ERROR, 13.
- Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 14-19.
- In criminal prosecutions, see CRIMINAL LAW, 5.
- Instructions in action on insurance policies, see INSURANCE, 11.
- Mandamus to compel, see MANDAMUS, 2.
- Laches in bringing case to trial, see MANDAMUS, 2.
- Setting aside verdict, see NEW TRIAL.
- Amendment of pleading during trial, see PLEADING, 5-8.
- Evidence admissible under pleadings, see PLEADING, 11.
- Place of trial, see VENUE.
- Examination of witnesses, see WITNESSES.

Trial—Continued.

1. TRIAL (32)—REOPENING CASE FOR FURTHER EVIDENCE—DISCRETION. It is discretionary for the trial court, after announcement of a tentative decision, to reopen the case for further evidence, where no formal judgment had been entered. *Simpson v. Sisters of Charity of the House of Providence*..... 82
2. TRIAL (53)—QUESTIONS OF LAW OR FACT—CONSTRUCTION OF WRITINGS. Where a transaction consists wholly of letters and telegrams, whether the correspondence constituted a contract is a question for the court. *Schulze v. General Electric Co.*..... 401
3. TRIAL (54)—QUESTIONS OF LAW OR FACT—UNCONTROVERTED EVIDENCE. Where there is no substantial conflict in the testimony, whether a promise was a collateral one to answer for the debt of another, or an original undertaking, is one of law. *Steffert Company v. Wright* 616
4. TRIAL (60)—PROVINCE OF COURT AND JURY—DIRECTION OF VERDICT. In an action at law tried to the jury, the court may sustain a challenge to the sufficiency of the evidence only where there was no substantial evidence tending to support the material issues. *Harris v. Saunders* 195
5. TRIAL—SPECIAL VERDICT—ASSENT OF REQUIRED NUMBER. Under Rem. Code, § 358, authorizing a verdict agreed to by ten of the twelve jurors, and § 364, authorizing special findings, a jury is properly instructed that any ten of their number may answer any one of the special interrogatories submitted. *Bullock v. Yakima Valley Transportation Co.*..... 413
6. TRIAL (89)—INCONSISTENT OR CONTRADICTORY INSTRUCTIONS. In an action by a tenant for loss of crops through the landlord's breach of covenants to install a pump, in which defendant put in issue the plaintiff's allegation as to due care in attending an orchard, and set up a counterclaim for loss of defendant's share of the crop, instructions withdrawing the counterclaim on defendant's failure to show the amount of the damage are not misleading or inconsistent with instructions requiring the plaintiff to show that he substantially performed the contract. *Heitmiller v. Prall*..... 382
7. TRIAL (101)—INSTRUCTIONS ALREADY GIVEN—REQUESTS. It is not error to refuse an instruction in the language requested where the court in its own language gave it in substance. *Lund v. Griffiths & Sprague Stevedoring Co.*..... 220
8. TRIAL (117)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS. An instruction as to the difference between proximate and remote cause is not prejudicial in stating that plaintiff's negligence must be the proximate cause, as distinguished from a proximate cause, in order to prevent recovery, in the light of other instructions prop-

Trial—Continued.

erly defining proximate cause in connection with contributory negligence. *Bullock v. Yakima Valley Transportation Co.*..... 413

Trover and Conversion:

By broker, evidence of, see **BROKERS**, 1, 2.
Conversion of mortgaged property, see **CHattel Mortgages**, 3, 5.

Ultra Vires:

Acts of corporation, see **CORPORATIONS**, 7.

Undertaking Establishment:

As nuisance, see **NUISANCE**.

Undisclosed Agency:

See **PRINCIPAL AND AGENT**, 7.

United States:

Public lands, see **PUBLIC LANDS**, 1.

Unlawful Detainer:

See **LANDLORD AND TENANT**, 4-7.

Vacation:

Of allowance to widow, see **EXECUTORS AND ADMINISTRATORS**, 3.

Value:

Opinion evidence, see **EVIDENCE**, 13.

Variance:

Prejudicial effect, see **APPEAL AND ERROR**, 13.
As to defect in machine, see **MASTER AND SERVANT**, 14.
Between pleading and proof in civil actions, see **PLEADING**, 11.

Vehicles:

Weight of on highway, see **CRIMINAL LAW**, 1.

Vendor and Purchaser:

Compensation of broker procuring conveyance, see **BROKERS**, 3.
Covenants on sale of land, see **COVENANTS**.
Purchasers of property fraudulently conveyed, see **FRAUDULENT CONVEYANCES**.
Sale of mining property, see **MINES AND MINERALS**.
Transfers of ownership of personal property, see **SALES**.

1. **VENDOR AND PURCHASER** (43, 44, 159) — **MUTUAL AGREEMENT—REPAYMENT OF PRICE.** A mere mutual rescission does not conclusively presume an agreement to return the purchase price, as a contract is implied and the return may have been waived. *Strang v. Person* 503

Vendor and Purchaser—Continued.

2. **VENDOR AND PURCHASER (44, 166)—AGREEMENTS FOR RESCISSION—RECOVERY OF PURCHASE MONEY—JUDGMENT—FINDINGS—SUFFICIENCY.** Where purchasers were in arrears and could not pay and settled with the vendor by surrendering their rights and the premises and cancelled and destroyed the contract of purchase, they cannot recover sums they had paid on the purchase price. *Linville v. Wiedrich* 1
3. **VENDOR AND PURCHASER (60) — RESCISSION BY VENDEE—FRAUD—RELIANCE ON REPRESENTATIONS.** Purchasers of lots in a townsite in the far north of Canada, may rely on representations of the vendor as to the value and situation of the property; and recover purchase price paid on sales induced by false representations. *Shemanski v. Goldberg* 654
4. **SAME (172)—PLEADING (157)—STRIKING OUT IRRELEVANT MATTER.** In an action to recover moneys paid on a land contract, pursuant to an alleged mutual cancellation when the purchasers were in arrears and unable to pay, allegations of fraud by the vendors inducing the sale are properly struck out as immaterial. *Linville v. Wiedrich*. 1

Venue:

Consent to jurisdiction of lien on ship, see **APPEARANCE**.

Jurisdiction of courts, see **COURTS**, 1.

Allegation as to venue in replevin, see **REPLEVIN**, 2.

1. **VENUE (20)—CHANGE — PREJUDICE OF JUDGE — TIME FOR APPLICATION.** Since process to revoke an order for the custody of a child is not a matter of right, one who invokes the discretion of the court by filing an application for a modification cannot, after its exercise, ask a change of judges on account of prejudice, since it is not timely, under Rem. Code, §§ 209-1, 209-2, requiring an application for the change to be made on the party's first appearance. *State ex rel. Mead v. Superior Court*..... 636

Verdict:

In favor of third person as release of master, see **MASTER AND SERVANT**, 17.

Setting aside, see **NEW TRIAL**.

Irregularities or defects ground for new trial, see **NEW TRIAL**, 6.

In civil actions, see **TRIAL**, 5.

Vested Rights:

Protection, see **CONSTITUTIONAL LAW**, 1.

Of homesteader, see **PUBLIC LANDS**, 1.

Veterans' Welfare Commission:

Appropriation for, see **STATES**, 1.

Waiver:

- See ESTOPPEL.
- By appearance, see APPEARANCE.
- Of conversion, see BROKERS, 2.
- Of privilege, see WITNESSES, 1, 2.

Warranty:

- Admissibility of evidence to enlarge warranties of bill of sale, see EVIDENCE, 11.
- In contracts of insurance, see INSURANCE, 6.

Whiskey:

- Subject of larceny, see LARCENY, 1.

Widows:

- Allowance of, due process upon, see CONSTITUTIONAL LAW, 4.

Wills:

- Devise to grantee, see DEEDS.
 - Estoppel to contest, see ESTOPPEL, 1.
1. WILLS (1, 70-1)—ESTATES CREATED—CONDITIONS AND RESTRICTIONS—CONTESTING WILL. Where a deed to a devisee was made at the same time the will was executed, and the will recited that the property had been deeded to him, the grantee, to whom the deed was delivered at once, takes under the deed and not under the will, so that his estate is not defeated by a contest of the will, under the forfeiture clause in the will. *White v. Chellev*..... 628
 2. WILLS (70-1)—CONSTRUCTION—CONDITIONS—FORFEITURE THROUGH CONTEST. Where title to land devised had passed under a deed to the devisee, delivered during the testator's lifetime, it would not be forfeited by the grantee's contest of the will, under the forfeiture clause in the will in case of contests by beneficiaries. *White v. Chellev* 526

Witnesses:

- Harmless error in examination, see APPEAL AND ERROR, 16.
 - Experts, see CRIMINAL LAW, 3.
 - Indorsement of witnesses on information, see CRIMINAL LAW, 4.
 - Newly discovered impeaching testimony as ground for new trial, see CRIMINAL LAW, 5.
 - Opinions, see EVIDENCE, 13.
 - Absence, as ground for new trial, see NEW TRIAL, 3.
1. WITNESSES (74, 101) — CROSS-EXAMINATION — TO DISCREDIT CHARACTER WITNESS. In a prosecution for arson, it is error, on cross-examination of character witnesses testifying for the accused, to permit the prosecuting attorney to ask if the witnesses had heard about fires that had destroyed the house in which the accused and

Witnesses—Continued.

his father had lived; the questions not being directed to knowledge of rumors or accusation against the accused or tending to discredit the evidence that this reputation was good. *State v. Presta*.... 256

2. WITNESSES (96)—PRIVILEGE—WAIVER. Rem. Code, § 6262-13, providing that no person shall be prosecuted on account of any transaction concerning which he shall be compelled to testify, does not render a witness immune from prosecution where he testified voluntarily and made no claim of privilege; and in such case, sureties on his bail bond cannot claim the privilege to evade forfeiture of the bond. *State v. Whalen*..... 287

Work and Labor:

Liability of estate for service rendered to decedent, see EXECUTORS AND ADMINISTRATORS, 4.

Workmen's Compensation Act:

See MASTER AND SERVANT, 1-3, 7-11.

Validity as being class legislation, see CONSTITUTIONAL LAW, 3.

Title of act, see STATUTES, 2.

Writings:

Oral evidence to establish lost writing, see EVIDENCE, 7.

Writs:

See INJUNCTION; MANDAMUS.

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